AN EXACT ABRIDGEMENT OF THE Two last VOLUMES OF REPORTS OF Sr. EDW. COKE, Knight.

Entituled the ~~12th.~~ and 13 *th.* Parts: Being a Supplement, And observing the Method of *Edward Trotman*, Esquire.

By THOMAS MANLEY, *Of the* Middle-Temple.

With a Table Containing the Principal Matters therein.

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FH
MVSEVM
BRITANNICVM

TO THE READER.

HOw acceptable all the the *Works* of our *Eminent Author* have been, their daily and frequent *uſe ſufficiently demonſtrates*: *There is not the meaneſt* Tyro, *in the learning of the Law, that thinks his Study complete without* Coke's *Intire*

Works, whose sufficiency hath obtained such Repute, that his Ipse Dixit *rules as a definitive Sentence. We need not urge further of our Author's Worth, but only tell you, that finding his eleven Reports abridged by Mr.* Trotman, *in English, I judged it not amiss, by this supplement, to give you the rest; which, as they trace the method of Mr.* Trotman, *so I doubt not, shall find the like acceptation:*

tation; Such whose narrow Purses cannot reach the other Volumes in folio, nor it may their Genius carry them to understand the Language they are written in originally, may bona cum fortuna *rest satisfied with this, which is as exact as a Translation and Abridgement can be, (faults of the Press only excepted.) I will conclude with a Distich of* Martial *the Epigrammatist;*

Quid re vana juvant miseræ ludibria Chartæ?
Hoc lego, quod possis dicere jure meum est.

T. M.

Pasch. 4. *Jacobi* Regis.

Ford *and* Sheldon's *Case*, *upon Information in the* Exchequer *for the King.* 1.

THomas *Ford*, a known Recusant before the 23 of *Eliz.* for money lent to *Sheldon*; some before, and some after the said 23 *Eliz.* took Recognizance in the Names of others, and also a Rent-charge to them in Fee, with a Clause of Redemption by Deed; the Condition of the Recognizance, being for performance of the Covenants in the Deeds; and afterward was made the Statute of the 28 *Eliz.* which was, That as often as any Failer was made, in the payment of 20 *l.* a Month, that so often the Queen, by Proces out of the *Exchequer*, might take and enjoy all the Goods, and two Parts &c. And after the said Act, *Ford* lent the several Sums of Money, and took the Securities as aforesaid, amounting in all to 21000 *l.* which being to *Ford*'s use, were all forfeited. Afterwards, 41 *Eliz.* was Convict of Recusancy, and did not pay the 20 *l.* a Month: If the King should have the Benefit of these Recognizances and Securities, was the Question.

1. Upon Debate, it was obj ected by *Ford*'s Councel, That the Recognizances had not been Forfeited, though they had been made in *Ford*'s Name; the Statute speaking onely of Goods, which doth not include Debts. As if the King grant all the Goods of *J.* S. coming to him by Attainder, the Patentee shall not have Debts: And

(a) c. 1. (b) c. 6.

a Penal Law shall not be extended by Equity.

Obj. 2. That these Recognizances are not within the Intention of the Act, being Saved of the Realty, and acknowledged to perform Covenants, as to the Rent-charge.

Ob. 3. No Fraud was in the Case: And then no Statute being in this Case, the Common-Law gives no benefit to the King. As if *Cestuy que use* had been Attaint of Treason, the Use being but a Trust could not be forfeited to the King: And it not a Use, *A multo fortiori*, a meer Trust.

Ob. 4. What Forfeiture accrues to the King in this Case, must be by force of the words (*Goods*) in the Statute, which cannot be, *Ford* having no Goods but a meer Trust. Also, one Recognizance was taken in the Names of others before the Statute, and therefore cannot be thought to defeat the King of a Forfeiture which was not then in use.

Resolved 1. By all the Barons, and *Popham* Chief Justice of *England*, and divers other Justices, that Personal Actions are as well included within this Word (*Goods*) in an Act of Parliament, as Goods in Possession: But because by Law, things in Action cannot be granted over; therefore by General Grant, without special words, can never pass. And where the Statute saith, *Shall take, seize, and enjoy all the Goods, and two parts*, &c. the King may well enjoy a Debt due to a Recusant, and by Process out of the *Exchequer* Levy it: and so *take and seize*, refers to Goods, and two Parts of Lands in Possession.

Resolved 2. That it was Originally for the Loan of Money, and both the Recognizance and Annuity were to secure the said Money. And Recognizances forfeited, are but Chattels Personal.

Resolved 3. There was Covin apparent; for he being a Recusant always as aforesaid, and so chargeable to the King, his taking the Recognizances in the Name of others,

thers, shall be Construed with an Intent to prevent the King of his Forfeiture: And so shall all Recognizances taken in others Names, after the said Act, be presumed to be taken. As to *Cestuy que use*, who neither hath *Jus in Re*, nor *Jus ad Rem*, true it is, he cannot Forfeit; but an Act done, to defraud the King of his lawful Duty, the King shall not be barred thereof *per obliquum*, if the Act was made, *de directo*. And for this, If a man outlawed buy Goods in the Names of others, the King shall have them notwithstanding. So if an Accountant to the King purchase Lands in others Names, yet the King shall seize those Lands for Money due to him. And this appears by *Walter Chirton's* Case, *Trin.* 24. *Ed.* 3. *Rot.* 4. *in Scaccario*; for *Rex fallere non vult, falli autem non potest*. See another President, *Trin.* 24. *Ed.* 3. *Rot.* 11.

Resolved 4. *Non refert*, Whether the Duty do accrue to the King, by the Common-Law, or by the Statute: And though one of the Recognizances was taken before the Statute of the 28 of *Eliz.* yet that was to his use: And though *Ford* was not Convict till the 41 of *Eliz.* that is not material; for he was subject to a Forfeiture before. 3.

Pasch. 4 Jac. *In* Chancery, 27 Junii, 29 Eliz. *The Case between the Lord St.* John *of* Bletso, *and the Dean of* Gloucester. 3.

The Lord St. *John* brought a *Quare Impedit* in the Common-Pleas against the Defendant, for the Church of *Penmark*, in the County of *Glamorgan*, which Suit was staid by *Aid-prayer*, and the Record removed into the *Chancery*: The Plaintiff moved for a *Procedendo* and upon *Oyer* of Cause, before Sir *Thomas Bromley* Lord Chancellor, in the presence of Sir *Gilbert Gerrard*, Master of he Rolls, and *Shute* and *Windham* Justices; and *Popham*

Attorney, and *Egerton* Sollicitor of the Queen; the Plaintiff ſhewed a Gift in Tail of the ſaid Advowſon made to his Anceſtor in 38 *R.* 2. and a Verdict for the ſame in 12 *H.* 8. and a preſentation by his Grandfather to the ſaid Church, of a Clerk that was admitted, inſtituted, inducted, and had poſſeſſion divers years, with other matters to prove the Plaintiffs Title, yet for that the Defendant, and thoſe from whom he claimes, had time out of mind poſſeſſed the ſaid Parſonage as Impropriate; And for that it will be a dangerous Preſident to all Owners of Impropriations. It was Reſolved by the Court of Chancery, by the advice of the Juſtices and Councel Learned by the Queen aforeſaid, That no *Procedendo in loquela* be granted. *Vide* Ridley, *fol.* 153, 154. the beginning of Appropriations and Annuities to be diſcharged of Tythes, *Vide ibid.* 155. That the Saxon Kings appropriated eight Churches to the Monaſtery of *Croyland.*

A. Trin. 37 Eliz. *In the Exchequer Chamber;* Crimes *and* Smith.

The Abbot of *Sulby* held the Parſonage of *Lubbenham* in *Leiceſterſhire* to his proper uſe, which as impropriate came to *H.* 8. by the diſſolution of Monaſteries, 31 *H.* 8. *c.* who in the 37th. year of his Reign granted it in Fee-Farm; under which Grant the Plaintiff claimed: The Defendant obtained a Preſentation of the Queen, and to deſtroy the ſaid Impropriation, ſhewed the Original Inſtrument of it, 22 *Ed* 4. with Condition in it, That a Vicaridge ſhould be competently endowed, which was alledged never to be done.

But for that the Rectory was reputed and taken to be appropriate, and a Vicar preſented, admitted, inſtituted and inducted as a Vicar, lawfully endowed, and paid his firſt Fruits and Tenths.

Reſolved

Resolved by all the Court, that it shall be presumed that the Vicaridge was lawfully endowed. And that it is a dangerous Prefident to exam ine Originalls of Impropriations and Endowm.nts of Vicaridges: for that they may perish. And so it was decreed for the Plaintiff.

Hill. 4. *Jac. Regis. Bedle* and *Beard.* 4.

Anno 31. *Ed.* 1. The King being seized of the Manor of *Kmbolton*, to which the Advowson of the said Church was appendant by Letters Patents, granted the said Mannor, with the Appurtenances, to *Humphry de Bohun*, Earl of *Hereford, in tayl generall. Humphry de Bohun* the Issue in tayl by his Deed. 4*o Ed.* 3. granted the said Advowson, then full of an Incumbent, to the Prior of *Stonely*, and his Successors. And at next avoydance they held *In proprios usus:* Upon this Appropriation, *Concurrentibus his quæ in jure requiruntur*, the Prior and his Successors held the same till the dissolution of the Monastery. 27 *H.* 8. The said Mannor descended to *Edward* Duke of *Buckingham*, as Issue to the Estate Tayl. And the Reversion descended to *H.* 8. The Duke 13 *H.* 8. was attaint of High Treason. 14 *H.* 8. The King granted the said Mannor, *&c.* with all Advowsons appendant *&c.* to *Richard Wingfield*, and his Heirs Males. 16 *H.* 8. It was Enacted, that the said Duke forfeit all Mannors, *&c.* Advowsons, *&c.* which he had, *&c.* in 4 *H.* 8. The King 37 *H* 8. granted and sold the said Rectory of *Kimbolton*, as impropriate in Fee, which by mean conveyance came to the Plaintiff for 1200 *li.* 37 *Eliz. Beard* the Defendant got a Presentation of the Queen by *Lapse*, pretending the said Church was not lawfully impropriate to the Prior.

1. For that *Humphry*, who granted to the Prior, had nothing in it, nothing passing to his Ancestor by 5.

these words, *Manerium cum pertinentiis.*

2. Or for that having no more but an Estate Tayl by his death, his Grant was void.

But Resolved by the Lord Chancellor *Ellesmere*, with the principal Judges, and upon consideration of Presidents, that the Plaintiff shall enjoy the Rectory: for though by any thing which can now be shewn, the Impropriation is defective, yet it shall be now intended, in regard of the antient and continual possession, that there was a lawfull grant of the King to the said *Humphry* who granted in Fee, so that he might lawfully grant it to the said Priory: *Omnia præsumitur solemniter esse acta.* And all shall be presumed to be done, which might make the antient Impropriation good; And antient Grants and Acts shall not be drawn in question, though they cannot be shewn: for *Tempus edax rerum.* Letters Patents and Writings may consume, be lost or imbezilled. And therefore the Church was allowed to be rightfully impropriate, and the rather, in regard of the antient and long possession of the Owners of the said Rectory.

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6. *Mich. 4. Jac. Regis.*
Case of Forfeiture by Treason.

Hill 43 *Eliz.* A Case was moved to all the Justices: Tenant in Tayl before the Statute of 26 *H.* 8. made a Feoffment in Fee to the use of himself, and his Wife in Tayl. And after the said Statute, the Husband was attaint of High Treason, 31 *H.* 8. and dyed. The Wife continued in possession and dyed, their Issue enter and die, and this descends to his Issue, and all this found by Office.

The Question was, if the Issue in Tayl or the King shall have the Land.

1. And

1. And it was objected, that the antient Estate Tayl cannot be forfeited, because it was discontinued, and such right of Action cannot be forfeited. As was agreed in the Marquess of *Winchesters* Case. 3 Co. 2.

2. The Feoffor himself in this Case had not any right to the antient Estate Tayl, (it being extinguished by his Feoffment) and therefore by his Attaint, could not forfeit what he had not.

3. The Issue in Tayl is remitted to that antient right which cannot be forfeited; And the new Estate Tayl derived under the discontinuance, which may be forfeited by the Statute 26 *H.* 8. *cap.* 13. is continued, and by Act in Law, *viz.* the discent and remitter avoided. And the Kings Estate may be divested out of the King by remitter. As if Tenant in Tail grant Land to the King, *&c.* and the King grant the Land to the Tenant in Tail for life, the remainder to his Son and Heir for life: Tenant for life dies, the Issue by and in Law is remitted, and the Kings Estate is divested out of him. This accords with *Plow. Com.* 489. *Nicols* Case.

1. Resolved that in this Case the Issue in Tail is barred: for though right of Action cannot be given to the King, by the 26 *H.* 8. yet when Tenant in Tail discontinues his Estate to the use of himself in Tail, and after is attaint of Treason, now by that Statute he doth not onely forfeit the new Estate in Tail, but by this, the right of the antient Estate is barred for ever. And so note, out of the said Statute, a diversity between a naked right of Action not forfeitable, and an Estate of Inheritance forfeitable, coupled with an antient right, for which the Forfeiture of the possession is barred by the said Act: And it is not like the Case in *Plow. Com.* of Remitter, for this is no barre of an antient right.

7. Pasch. 4 Jac. Regis. *Case at a Committee concerning Bishops.*

At this Parliament held *Pasch. 4 Jac. Regis*, It was strongly urged at a Grand Committee of Lords and Commons in the Painted-Chamber, that such Bishops as were made after the first day of the Session, were not lawful Bishops.

1. Admitting them Bishops, yet the manner and form of their Seals, Stiles, Process, and Proceeding, in their Ecclesiastical Courts, were not consonant to Law; Because by the Statute, 1 *Ed. 6. cap.* 2. it is provided, That thenceforth Bishops should not be Elective, but Donative, by Letters-Patents of the King. And for that at this day all Bishops were made by Election, not Donation of the King; therefore the said Bishops are not lawful.

2. By the same Act it is provided, That all Summons &c. and Process in Ecclesiastical Courts, shall be made in the King's Name and Stile, and their Seals Engraven with the Kings Arms, and Certificates made in the Kings Name: It was therefore concluded, That the said Statute being still in force, by Consequence all Bishops made after the Act, 1 *Jac.* were not lawful Bishops. And the Proceedings being in the Name of the Bishop, makes them unlawful. *Quia non observata forma infertur adnullatio actus.* Upon Consideration had of these Objections by the Kings Commandment, it was Resolved by *Popham*, Chief Justice of *England*, and *Coke* Attorney of the King; and after affirmed by the Chief Baron, and the other Justices Attendant to the Parliament, that the said Act of the 1 *Ed. 6. cap.* 2. is not now in force, being repealed, annulled, and annihilated, by three several Acts of Parliament: Any whereof being in force, it makes that Act of 1 *Ed. 6.* that it cannot stand,

Quia

Quia Leges Posteriores, Priores contrarias abrogant. And by the Act of the 25 *H.* 8. *cap.* 20. Is set forth the manner of Election and Consecration of Archbishops and Bishops. And also for the making and execution of all things which belongs to their Authority: within which words, the Stile and Seal of their Courts, and the manner of their Proceedings, are included. Which Act of 25 *H.* 8. is revived by 1 *El. cap.* 1. and consequently, that of 1 *Ed.* 6. *cap.* 2. is repealed.

It appears by our Books, if a Deacon or Priest take a Wife, their Marriage is voidable not void, for they had not vowed Chastity. Otherwise, of a *Monk* or a *Nun*. And this appears 5 *Ed.* 2. Title *Nonability*, 26. 19 *H.* 7. Title *Bastardy*, 33. 21 *H.* 7. 39. *b.*

Mich. 4. Jac. Regis.

Case of the Stannaries. 9.

It was Resolved this Term in the *Star-Chamber*, That the King had not the Emption of Tin in *Cornwal* by his Prerogative: for *Stanni nec plumbi fodinæ*, &c. or other base Mines, belong not to the King by his Prerogative, but to the Subject Owner of the Land. But the Emption of Tin in *Cornwal* belongs to the King, as an antient Right and Inheritance: for though now a Reason cannot easily be rendred of things done time out of mind; yet it may well be, that all the Land in that County was the King's Demesne, and upon Grant of the Land, the King reserved the Mines to himself. These Tin Mines being of great Antiquity; as appears, *Ex Diodoro Sicula*, *Et certo certius est*, That all the Land in *England*, is derived mediately or immediately from the Crown; and therefore such a Profit may have a reasonable Commencement; Usage also allowing it to the King: for all *Cornwal* was within the King's Forest, which by King

John

John was disafforested; as by *Camden* appears. And it is evident, that before 33 *Ed.* 1. all the Tin in *Cornwal*, and *Devon* also, was the Kings, whoever owned the Land. And this is proved by divers Records, and by an antient Charter of King *John*, among the Bishop of *Exeters* Records, *In hæc verba.* Johannes *Dei Gratia Rex* Angliæ, *&c. Omnibus Bellivis salutem. Sciatis quod intuitu Dei & pro salute animæ nostræ, &c. dedimus &c. Deo & Ecclesiæ Beati* Petri Exon. *& venerabili Patri* Simoni *Exon. Episcopo & successoribus, &c. decimam de antiqua firma Stanni in Com. Devon. & Cornub. Habendum sibi & successoribus, &c. cum omnibus libertatibus & liberis consuetudinibus ad eam pertinentibus, per manus illius vel illorum qui stannaria habuerint in custod. &c.*

10. *Rex*, Roberto *de* Courtney *salutem*, *Mandamus vobis quod sine dilatione & difficultate aliqua, habere facietis Dominæ* Johannæ *Reginæ matri nostræ stannaria Com.* Devon. *&c.* Paten. 1 H. 3. M. 4.

Rex concessit Johanni filio Richardi stannaria in Cornubia reddendo 1000 marks. 4 *H.* 3. *Fines.* 5 *H.* 3.

Rex, &c. Sciatis quod concessimus Richardo dilecto fratri nostro stannariam nostram Cornubiæ cum pertinen. prohibiting Tin to be transported without the said *Richards* Licence, 10 *H.* 3 *M.* 9.

See also 10 *Ed.* 2. *Inqui.* 2. *Nu.* 29.

There are two several Charters, both dated 10 *April* 33 *Ed.* 1. One, *ad emendationem stannariarum nostrarum in Cornub.* The other, *Ad emendationem stannariarum nostrarum in Devon.* That of *Cornwall* hath these word, *Concessimus eisdem stannatoribus quod fodere possint stannum, et turbas ad stannum fundendum ubiq; in terris nostris et vastis nostris, et aliorum quorumcunq; in Com. prædict. et Aquas, et aquarum cursus divertere, ubi et quoties opus fuerit, &c. ad fundaturam stanni sicut Antiquitus consuevit, sine impedimento nostro seu aliorum quorumcunq; Ac quod omnes stannatores nostri præd. totum stannum suum ponderatum, &c. licitè vendere possint cuicunq; voluerint, faciendo nobis et hæ-*

redibus

edibus noſtris Cunageum, et alias Conſuetudines debitas, niſi nos vel hæredes noſtri ſtannum illum emere volumus.

This was confirmed 4 *Ed.* 2. And alſo 1 & 17 *Ed.* 3. *De Adviſamento conſilii noſtri ordinavimus, quod ſtannum in Com. Cornub. et Devon. ad opus noſtrum capiatur pro defenſione regni noſtri, &c. Et ad partes marinas celeriter mittatur, &c. Ita quod hominibus quibus ſtannum illum capi contigerit de pretio ejuſdem ſtanni ad certos terminos ſolvend. ſufficiens ſecuritas per nos fiat, Aſſignavimus vos, &c. ad capiend. ad opus noſtrum totum ſtannum in Com. præd. Cunitum et etiam Cuniend. cum cunitum fuerit:* with Authority to take Carriages and Commandment to the Sheriff to pay for the ſame. *Rot. Aml. yse An.* 12. *R.* 2. *art* 1.

Edward the black Prince grant, and the King, (21 *E.* 3.) confirmed to *Tydman* of *Lymberge*, *Cunageum Stannariæ, &c. nec non emptionem totius Stanni, &c. infra, &c. pro fine mille marcarum, et ſeddendo* 3500 *marcas.* The like done to one *Brockhouſe*, 7 *Ed.* 6. The Charter of 33 *Ed.* 1. was confirmed, 8 *R.* 2. 1 *Ed.* 4. 3 *H.* 7. The 11 *H.* 7. a certain weight and meaſure was ordained to be uſed through *England*; yet the weights belonging to the Carriage of Tin, were excepted in that Statute. *ff.*

The Stile of the Court of Stannaries is, *Magna Curia Domini Regis Ducatus ſui Cornub. apud Cockerenton in Com. Devon. Johanne Comite Bedford Cuſtode ſtannar. dicti Domini Regis aut Reginæ in dicto Com. Devon.* By which it appears, that all the Tin belonged to the King.

For the Antiquity of Tin Mines in *Cornwall*, ſee *Camden* in *Cornwall* 121. And *Diodorus Siculus*, *L.* 5. *c.* 8. *fo.* 142.

Upon which it was reſolved, 1. That the King hath all the Tin, as well in the Subjects Lands as his own.

2. It is abſurd for the King to reſerve Emption of his own Tin.

3. The

3. The King grants *Stannatoribus* divers liberties which are enjoyed by the Tinners, as well in the Subjects Lands, as the Kings own.

In the Session of Parliament held in Decemb. *An.* 4. *Jac. Regis.*

12. *Case of the Kings Prerogative in Saltpeter.*

All the Justices, viz. *Popham* Chief Justice of *England*, *Coke*, Chief Justice of the Common Pleas *Fleming*, Chief Baron. *Fenner*, *Searle*, *Yelverton*, *Williams* and *Tanfield*. Justices met at Serjeants Inne, to consult what Prerogative the King had in digging and taking of Saltpeter to make Gunpowder by the Law. And upon conference between them, these points were resolved by them all, *una voce*.

1. That in as much as Gunpowder concerns the defence of the Realm, and insomuch as Saltpeter (whereof Gunpowder is made) is within the Realm: the King shall not be driven to buy it, but may take it according to the Limitations following.

2. That, though the King cannot take the Trees of his Subject growing upon his Freehold; nor Gravel in the Inheritance of his Subject for reparation of his houses: as 11 *H.* 4. 28. Yet 'tis resolved, that he may dig for Saltpeter, because the Kings Ministers who dig for the same, are bound to leave the Inheritance of the Subject, in as good plight as they found it, which they could not do, if they should cut the Timber growing, which would be to the Subjects disinherison.

The Case of Gravel for reparation of the Kings Houses, may not be compared to this: for Saltpeter extends to the defence of the whole Realm, not so the reparation of the Kings Houses, 13 *H.* 4. The King may charge for Murage of a Town: And so for Portage; but not for

for making a Wall about his own House: When Enemies invade the Realm, it is lawful to come upon any Land adjoyning to the invaded Coast, to make Trenches or Bulworks, 8 *Ed.* 4. 23. And in such Cases they may dig for Gravel. 3 *H.* 8. *fo.* 15. And in this Case the Rule is true: *Princeps et respublica ex justa causa possunt rem meam auferre.*

3. Resolved, That the taking of Saltpeter is a purveyance of it, for the making of Gunpowder, for the necessary defence of the Realm. And therefore is an incident inseparable from the Crown, and ought to be taken onely by the Kings Ministers, and not converted to any other use then the defence of the Realm: And 'tis not like Silver or Gold Mines; for there the King hath Interest in the Mettall, and may dig, *Quia quando lex alicui concedit aliquid, Concedere videtur id sine quo res ipsa esse non potest: Vide: Plow. Com. in le Case de Mynes*: so the King may dig for Treasure *Trove eadem ratione.* /3.

4. The Ministers of the King cannot undermine, weaken, or impair any the Walls of Foundations of any Houses or Buildings whatsoever. Nor dig in the Flore of a Mansion-house, which serves for the Habitation of a man: because it is his place of refuge and defence.

There are two notable Presidents: that the King by his Prerogative, had power to prohibit Depopularion, and provide for Habitation.

The one in the 43 *Ed.* 3. *Rot. claus. in turri: num.* 23. *pro villa de Southampton.*

The other *An.* 21. *R.* 2. *in dorso claus. par.* 1. *N.* 15.

Neither may the Kings Ministers dig in any Barn-floore used for Corn, Hay, *&c.* but they may dig in the floores of Stables and Oxehouses, so that they leave room for the Horses and other Cattel of the Owner, and put it in convenient time into as good plight as they found it. Also they may dig in Cellars and Vaults: and any Mud walls, being not Walls of a Mansion-house, and in the ruines and decayes of any Houses or Buildings.

5. They

14. 5. They ought to make the places where they dig, as commodious to the Owner as before.

6. They may work in the possession of the Subject, but betwixt Sun-rising, and Sun setting.

7. They may not place any Furnace or other Vessels in any Subject's House, without consent, nor so near it, as to prejudice the same.

8. They are not to stay over long in a place, nor to return thither again in a long time.

9. Resolved, That the owner of the Land cannot be restrained from digging, and making Saltpeter, for the King hath no Interest in it, the property is in the owner of the Land. Before the 31 *Eliz.* no King or Queen of this Realm granted any Licence for taking Saltpeter; but in that 31 year, there were two, the one to *George Constable* Elq; and the other generall to *George Evelin, Richard Hills*, and *John Evelin*: And after *Scilicet* 18 *Octob.* 2. *Jacob.* Commission was granted to *Evelin*, and others, to take Saltpeter, *&c.* So that there were but three Licences ever made.

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15 *Case of Treason.*

In this very Term, one *George Leake*, a Chancery Clark, had upon an ordinary piece of Parchment, by great *deceit* fixed with a kind of Glew, another Parchment so thin, that it appear but one piece. And upon the thin piece he writ by good Warrant a *Li cense*, which brought to the Chancellor, was sealed with the Great Seal. After the *George* took the thin piece upon which the writing was, from the other to which the Seal was fixed, and then all was blank, with the Great Seal annext; upon which blank, the said *George* writ a Grant of the King of certain Lands; and what Offence this was, was the Question. And after a long debate upon the 25 *Ed.* 3. 2 *H.* 4. 25. *Stamford l.* 1. *fol.* 3. 40 *Ass. pla.* 33. 37 *H.* 8. Title

8. Title *Treason*, 4 Hen. 4. *Clauſ.* 42 *Ed.* 3. *memb.* 8. *in dorſo*, where the Caſe was, That King *Richard* the Firſt by his Charter, granted divers Lands and Liberties, *Abbati de Bruera*, in which the Abbot raſed out this word *Fittetrida*, and inſtead of it writ *eſt leigh*, and upon ſhewing it, obtained a confirmation of it from King *Ed.* 3. And an allowance of it *in Banco R.* And for this Offence, the Abbot was called before the King and Council in the *Star-Chamber*, where the Abbot being Convict, it was part of the Sentence, That the Charter, confirmation, and allowance of it, ſhould be brought in to be cancelled; where note,

1. The Antiquity of the Star-Chamber being then a Court.

2. That the raſure was not any Counterfeit of the Great Seal; for if the Offence had been High Treaſon, it ſhould not have been determined before the King and Council.

3. That Spiritual Perſons were then puniſhable before Temporal Judges.

4. That if there be a raſure of a Deed between Subject and Subject in a place material, all the Deed becomes naught; ſo if a Patentee raſe his Letters Patents in a place material.

Thence concluded, That if the raſing of a word in the Kings Patent be not Treaſon, then the raſing of two or three, or all the words of the Patent, and writing a new Grant is not Treaſon.

By the Statute of the 25 *Ed.* 3. it is provided, That becauſe many other Caſes of like Treaſon might happen in time to come, which men cannot think or declare at preſent. That if another Caſe ſupervened Treaſon, and not ſpecified in the Act, ſhall come before any of the Juſtices, they ſhall ſtay without going to Judgment of Treaſon, untill the Caſe be ſhewen before the King in Parliament.

1. That

1. That though a Case happen like to the Cases of Treason mentioned in the said Act; yet that the Judges ought not to judge it Treason, but it ought to be declared in Parliament.

2. That when a particular Case was adjudged High Treason, (as the Case of murdring an Embassador of a King) *Et Legatos violare contra jus Gentium est.*

Afterwards *George Leake*, upon Examination before the chief Justice of *England*, made a clear Confession of of all the manner and circumstances of the Fact as aforesaid; whereupon Two Questions were moved,

1. Whether this Offence were High Treason or no: And in this the Justices were divided; my self and divers others holding, That this Act was not Treason; but the chief Justice and divers others were against us.

2. If it be High Treason, then whether he may be indicted generally for the Counterfeiting of the Great Seal, or else the special Fact must be expressed.

By reason of diversity of Opinions, *Respectuatur, vid. Flet. lib. 1. cap. 22. Item crimen falsi dicitur, cum quis illicitus, cui non fuerit ad hoc data authoritas de sigillo Regis rapto vel invento et brevia Cartarii: vide le Attainder de Elizabeth Barton, Edw. Bocking.* by Parliament, &c. 25 *H. 8. c. 12.*

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17. Hill. 24 Eliz. *In the Exchequer.*

A Merchant brought eighty weigh of Bay-Salt by Sea to a Haven in *England*, and out of the Ship sold 20 weighs, and discharged them to another Ship, wherein they were transported, being never actually put on shore: And for the residue, *viz.* 60 weigh, he agreed for the Custome, and put them upon Land; and now the doubt was, 1 *Eliz. cap.* 11. for the words of the Statute concerning Exportation, sent from the Wharfe, Key, or other place on the Land, and concerning Importation taken up, discharge, and lay on Land. If in this Case

the

the said 20 weighs, which alwayes were waterborn, and never touched the Land, ought to pay Custome as well inwards as outwards: And it was Resolved,

That in both the Cases Custome ought to be paid; and forasmuch as no Custome was paid, It was Resolved, That the Goods were forfeited.

Note, No Act of Parliament can bind the King from any Prerogative which is sole and inseperable to his person, but that he may dispence with it by a *non obstante*, as his Soveraign Power of Commanding his Subjects to serve him for the publick Weal. See 23 *H.* 6. *cap.* 8. 2 *H.* 7. 6. 13 *R.* 2. *Parl.* 2. *cap.* 1. See also 4 *H.* 4. *cap.* 31. *Coke l.* 2. *fol.* 69. *18.*

But in things which are not incident solely and inseparably to the person of the King, but belongs to every Subject, and may be severed there an Act of Parliament may absolutely bind the King. As if an Act of Parliament do disable any Subjects of the King to take any Land of his Grant, or any of his Subjects (as Bishops) as it is done by the Statute, 1 *Jac. cap.* 3. to Grant to the King, this is good; for to grant or take Lands or Tenements, is common to every Subject.

Hill. 4. Jac. Regis, *Care of High Commissioners, If they have Power to Imprison.* *19.*

Mich. 4 *Jac. post prand.* There was moved a Question amongst the Judges and Sergeants at Sergeants Inn; If the High Commissioners in Ecclesiastical Causes, may by force of their Commission imprison any man or not?

First, Resolved by all, That before the Statute of the first of *Eliz.* the King might have granted a Commission to hear and determine Ecclesiastical Causes; yet the Commissioners ought to proceed according to the Ecclesiastical Law allowed within the Realm. *Vide Cawdrye's*

Case. 5 *Report.* Then all the Question rests upon the Act, 1 *Eliz.* which hath three Branches;

1. Such Commissioners have power to exercise Jurisdiction Spiritual and Ecclesiastical.

2. By force of Letters-Patents, they have power to visit, reform, &c. all Heresies, &c. which by any manner of Spiritual or Ecclesiastical Power, &c. can or lawfully may be Reformed, &c. So that these Branches limit the Jurisdiction.

3. That after such Commission delivered to them, shall have power by vertue of this Act, and the said Letters-Patents, to exercise, &c. all the Premisses, &c. according to the Tenor, &c. This Branch gives them Power to execute their Commission.

But it was Objected, That this Branch gave no power to the Queen, to alter the Proceedings of the Ecclesiastical Law; or to prescribe what manner of proceedings or punishment, concerning the Lands, Goods, or Bodies of the Subject. And this appears by the Title of the Act (*Restoring*) the intent being to make Restitution, not any Innovation.

See Simpson's Case 42 Eliz. 4 Just. 333.

Vide, a notable Case adjudged in this Point, Hill. 42. El. fo. 389. *as to Imprisonment,* Smith's *Case: For at the last Consultation was granted: And at last, by the better Opinion, as to things committed to them by Commission, they may put Fine and Imprisonment.*

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24. By the 3 *H.* 7. *cap.* 2. 'tis Ordained, where Women, as well Maids, as Widows and Wives, having substance, &c. for the lucre of such substance, be taken by Misdoers, contrary to their Wills, and after married, &c. or defiled.

That what person hereafter so taketh, &c. against her will &c. such taking, &c. to be Felony: And the Misdoers, &c. to be reputed as Felons. Upon this, great question

question was moved, 4 & 5 *Phil.* & *Mar.* in the *Star-Chamber*, If the Eloynment against her without Mariage, or Carnal Copulation, be Felony or no? And the Opinion of *Brook*, and some other of the Justices was, that It was Felony. But *Sanders*, Lord Chief Justice, was against it; and afterwards, as *Peryam* chief Baron did Report, It was Resolved by all the Justices, That such Eloynment onely, is not Felony, by the intent of the Statute, without Marriage, or Carnal Copulation.

Note, By the express purview of the Act, the Accessary both before and after is made Principal.

Pasch. 4 Jac. *Regis.* 21.

By the Commandement of the King, it was referred to *Popham* Chief Baron, and my self, what Right the Queen, which now is, hath; and in what Cases to a Right claimed by her, called *Aurum Reginæ*; that is to say, *Pro centum marcis argenti, una marca Auri solvendum per illum qui se sponte &c. &c.* And upon consideration had thereof, and view of Records and Presidents, *viz. Librum Rubrum in Scaccario*, fol. 56. *de Auro Reginæ*; where it is said, that this is to be taken, *De iis qui sponte se obligant Regi*, &c. which is the Foundation of this Claim: And of a Record in the Tower, 32 *H.* 3. And a Record in the *Exchequer*, 4 *Ed.* 1. And a Record in the *Exchequer*, *Hill.* 12 *Ed.* 3. And in the Tower in the same year, in *Rot. Clauf.* And of Acts of Parliament, 15 *Ed.* 3. *cap.* 6. and 31 *Ed.* 3. *cap.* 13. and 13 *R.* 2. in *Turri*: And divers other Presidents and Process out of the *Exchequer*, in the time of *R.* 2. *H.* 4. and other Kings, till *H.* 7.

It was Resolved, that the Queen hath Right to it; but with these Limitations.

1. It ought to be *sponte*, by the Subject, *sine coactione*: And for this, all Fines upon Judgments, or by Offer or

Fine for Alienation, or any other Case, where the Subject doth it not *sponte, sine aliquâ coactione*; That the King of Right ought to have it, there the Queen shall have nothing.

2. It ought to be *sponte, sine consideratione alicujus reventionis seu interesse*; That the King hath *in esse, in jure Coronæ*: As upon Sale or Demise of his Lands, Wards, &c. these are Contracts concerning the Kings Revenues; and there it cannot be said, that the Subjects, *sponte se obligant*, as to purchase any the Revenues of the King.

3. It ought to be *sponte super considerationem & non ex mera gratia & benevolentia subditi*, Hil. 4. Ed. 1. *in Scaccario*, &c.

4. It ought to be *sponte, super considerationem quæ non tangit reventionem seu interesse Coronæ*, in any thing which the King hath. As if a Subject give the King a Summe of Money for Licence in Mortmain, or to create a Tenure of himself, to have a Fair, Market, Park, Chase, or Warren, in his Manor, there the Queen shall have it; for the Subject did this *sponte*: And this Resolution was reported to the King by *Popham*, in the Gallery at *White-Hall*.

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22. Pasch. 5 Jac. Regis. *The Case of Forests.*

This Term it was informed to the King, that great wrongs were done in the Forest of *Leicester*, in the County of *Leicester*; and in his Forest of *Bowland*, in the County of *Warwick*, parcel of his Dutchy of *Lancaster*. And upon this, by Warrant from the King under his Signet, all the Justices were assembled, to resolve certain Questions, to be moved concerning Forests, by the Attorney of the Dutchy, and the Councel of the other part; which were Forests and Chases: Which being matter in Fact, the

the Judges could not give their Resolutions, but by way of Directions. And it was Resolved,

1. That if these are Forests, it will appear by matter of Record, as by *Eyres* of Justices of Forests, Swanimotes, Regardors, &c. But the calling it a Forest in Grants, &c. proveth it not a Forest in Law.

2. Resolved by all the Justices, That if there be no Forests in Law, but Free-Chases; then who hath any Free-hold in them, may cut his Wood growing upon it, without view or Licence; leaving sufficient for Covert to maintain the Kings Games: so a common person having Chace in another Soil, the Owner may not destroy the Covert, nor Browse-wood.

3. Resolved, That in such a Chase, the Owner, by Prescription, may have Common for his Sheep, and Warren for his Coneys, by Grant or Prescription: but he must not surcharge or make Burrows in other places, than hath been used from the time of which: nor may he erect a new Warren without Charter.

4. Resolved, That who hath such a Warren, may lawfully build a Lodge upon his Inheritance, for preservation of his Game.

5. *Popham*, Chief Justice, said, That in the time of Chief Baron *Bett*, It was adjudged in the *Exchequer*, That a man may prescribe to cut his Wood upon his own Inheritance within a Forest, though it was against the Act, in the 43 *Ed.* 1. See the Abridgement, Title *Forest* 21. And this was the Case of *Sellenger*, *vide* 2 *Ed.* 2. Title *Trespass*, fol. 9. in the time of *Ed.* 1. *Trespass*, 239. *Plow. Com. Dyer* 72. 32. 22 *El.* 4. *cap.* 7. that the Subject may have a Forest. *Consuetudo ex rationabili causa usitata privat communem Legem.* And it was held by some, that this was but an Ordinance, not an Act of Parliament.

23. Paſch. 5 Jacobi Regis. *Case of Conſpiracy.*

This Term, in the Caſe between *Rice ap Evan ap Lloyd*, Plaintiff; and *Richard Barker*, one of the Juſtices of the Grand Seſſions, in the County of *Angleſey*, and others, Defendants.

1. Reſolved by *Popham* and *Coke*, Chief Juſtices, the Chief Baron, and *Egerton* Lord Chancellor, and all the Court of *Star-Chamber*; That when a Grand Inqueſt indicts one of Murder or Felony, though the Party be acquitted; yet no Conſpiracy lyes for him againſt the Indictors: for they are returned by the Sheriff by Law, to make Inquiry of Offences upon their Oath, for ſervice of the King and Country, and are compellable to ſerve the Law, 10 *Eliz.* 265. And their Indictment or Verdict is matter of Record, and called *Verum dictum*, and ſhall not be avoided by Surmiſe, and no Attaint lyes: And with this agrees the Books in 22 *Aſſiſe* 77. 27 *Aſs.* 12. 21 *Ed.* 3. 17. 16 *H.* 6. 19. 47 *Ed.* 3. 17. 27 *H.* 8. 2. *F. N. B.* 115. a. But otherwiſe of a Witneſs; for if he conſpire out of the Court, and after ſwear in Court, his Oath ſhall not excuſe his Conſpiracy before, for he is a private perſon.

2. Reſolved, That when the party indicted, is convict of Felony by another Jury, upon *Not Guilty* pleaded, there he ſhall never have a Writ of Conſpiracy: But when he is upon his Arraignment, *Legitimo modo acquietatus*. But in the Caſe at Bar, the Grand Jury who Indicted one *William Price*, for the Murther of *Hugh ap William*; the Jury, who, upon *Not Guilty* pleaded, convicted him, were Charged, Indicted, and Convict in the *Star-Chamber*, which was never ſeen before: For if the party ſhall not have a Conſpiracy againſt the Indictors, when Acquitted, *a multo fortiori*, when he is lawful Convict, he ſhall neither charge the Grand Inqueſt nor Jury that convicted

convicted him. But when a Jury acquits a Felon of Traytor, againſt manifeſt Proof, there they may be charged in the *Star-Chamber*, *ne maleficia remanerent impunita*. But if ſuch Suppoſals ſhall be admitted, after ordinary Judicial Proceedings, it will be a means, *ad detrahendos Juratores & deterrendos a ſervitio Regis*.

3. Reſolved, That *Barker* who was Judge of Aſſize, and gave Judgement upon the Verdict of Death againſt the ſaid *W. P.* and the Sheriff that executed him, nor the Juſtices of Peace that examined the offender, and the Witneſſes for proof of the murther before the Indictment, were not to be drawn in queſtion in the Star-Chamber for any conſpiracy, nor ought to be charged there with any conſpiracy, or elſewhere, when the party indicted is convicted, or Attaint of murther or Felony. And though ſuch perſon were acquitted, yet the Judge, *&c.* being by Commiſſion, and of Record, and ſworn to do Juſtice, cannot be charged for conſpiracy, for that he openly did in Court as Judge, Juſtice of Peace, *&c.* but if he hath conſpired before out of Court, this is extrajudiciall, but ſubordinations of Witneſſes, and falſe malicious proſecutions out of Court, *&c.* amounts to an unlawfull conſpiracy. And if Judicial matters of Record (which are of ſo high a nature, that for their ſublimity, they import verity in themſelves,) ſhould be drawn in queſtion by partiall and ſiniſter ſuppoſall and averments of offenders, there will never be an end of Cauſes, but Controverſies will be infinite, *Et infinitum in jure reputatur*, 47 *Ed.* 3. 15. 21 *Ed.* 4. 67. and 27 *Aſs. pl.* 12. But in a Hundred Court, or other Court which is not of Record, there averment may be taken againſt their proceedings, 47 *Ed.* 3. 15. 24.

Alſo one ſhall never aſſign for Error, that the Jury gave Verdict for the Defendant, and the Court entred it for the Plaintiff, *&c. Vide*, 1 *H.* 6. 4. 39 *H.* 6. 52. 7 *H.* 7. 4. 11 *H.* 7. 28. 1 *Mar. Dyer* 89. But in a Writ of falſe Judgement, the Plaintiff ſhall have direct averment, a-

gainst what the Judges in the inferior Court have done as Judges, *Quia Recordum non habent*, 21 *H.*6.34. Neither shall a Judge in the Cases aforesaid, be charged before any other Judge at the Suit of the King, 27 *Ass. pl.*18. & 23. 2 *R.*3.9. 28 *Ass. pl.*21. 9 *H.*6.60. *Catlyn* and *Dyer*, chief Justices, Resolved, That what a Judge doth as a Judge of Record, ought not to be drawn in Question in this Court.

25. *Nota bene*, that the said matters at the Bar were not examinable in the Star-Chamber; and therefore it was Decreed by all the Court, That the said Bill, without any Answer to it by *Barker*, shall be taken off the File, and utterly cancelled: And it was agreed, That the Judges of the Realm ought not to be drawn into question for any suppos'd Corruption, which extends to the annihilating of a Record, or tending to the slander of the Justice of the King, except it be before the King himself; for they are only to make an account to God and the King, otherwise this would tend to the subversion of all Justice, for which reason the Orator said well, *Invigilandum est semper, multæ invidiæ sunt bonis*; And the reason hereof is, the King himself being *de jure*, to deliver Justice to all his Subjects; and because himself cannot do it to all Persons, he delegates his Power to his Judges, who have the Custody and Guard of the Kings Oath. *Thorpe* being drawn into question for Corruption before Commissioners, was held against Law, and he pardoned: *Vide* the conclusion of the Oath of a Judge, *Stowes ch on. Ed.* 3. 312.

Weyland, chief Justice of the Common Bench, and *Heugham*, Justice of the Kings Bench, and other Justices were accused of Bribery, and their Causes were determined in Parliament.

Vide 2 *Ed.* 3. *fol.* 27. The Justices of *Trayl-Baston*, their Authority was grounded upon the Statute of *Ragman*, which you may see in old *Magna Charta*. *Vide* the form of the Commission of *Treyle-Baston*. *Hollingshead Chron. fol.*

fol. 312. whereby it appears, That the Corruption of his Judges, the King himself examined in Parliament, and not by Commission. *Absurdum est affirmare, recredendum esse non judici.*

Pasch. 4 Jacob. Regis, *Case concerning the Oath ex officio.* 26.

The Lords of the Council at *Whitehall*, *sedente Parliamento*, demanded of *Popham*, chief Justice, and my self, upon motion of the Commons in Parliament, In what cases the Ordinary may examine any person *ex Officio*, upon Oath; and upon Consideration and View of our Books, we answered the said Lords at another day in the Council Chamber.

1. That the Ordinary cannot constrain any man to swear generally to Answer to such Interrogatories as shall be administred unto them, but ought to deliver them a Copy of the Articles in writings, that they may know whether they ought to answer them by Law or no, according to the Course of the Chancery and Star-Chamber.

2. No man shall be examined upon the secret thoughts of his Heart, or of his secret Opinion, but of what he hath spoken or done. No Lay-man may be examined *ex officio*, *nisi in causis matrimonialibus et Testamentariis*, as appears by an Ordinance of *Ed.* 1. Title *Prohibition*, *Rastal.* See also the *Register*, *fol.* 36. the force of a Prohibition, and an Attachment upon it, by which it appears, That such Examination was not only against the said Ordinance, but also against the Custome of the Realm, which hath been time of which, &c. but also in prejudice of the Crown and Dignity of the King; and with this agrees *F. N. B. fol.* 41. And so the Case reported by my Lord *Dyer*, (not printed) *Trin.* 10 *Eliz.* One *Leigh*, an Attorney of the Common Pleas,

was

was committed to the Fleet, because he had been at Mass, and refused to swear to certain Articles; and in regard they ought in such case to examine upon his Oath; and hereupon he was delivered by all the Court of Common-Pleas.

The like in *Mich.* 18 *Eliz. Dyer, fol.* 175. in *Hinds* Case. Also *vide de Statute* 25 *H.* 8. *cap.* 14. which is declaratory as to this point. It stands not with the right order of Justice, that any person should be convict, and put to the losse of his Life, good Name, and Goods, unless by due Accusation and Witnesses, or by Presentment, Verdict, process of Outlawry, &c. And this was the Judgment of all the said Parliament. See *F. N. B.* Justice of Peace, 72 *Lamb.* in his Justice of Peace 338. *Cromptor* in his Justice of Peace 36. *b.* In all which it appears, That if any be compelled to Answer upon his Oath, where he ought not by Law, this is oppression, and punishable before a Justice of Peace, &c.

But if a Person Ecclesiastical be charged with any thing punishable by our Law, as for Usury, there he shall not be examined upon Oath, because his Oath is Evidence against him at the Common Law; but Witnesses may be cited. *Register title Consult. F. N. B.* 53. *d.* 2 *H.* 4. *cap.* 15. In *H.* 8. nor *Ed.* 6. time, no Lay-man was examined upon his Oath, except in the said two Cases. But in Queen *Maries* Reign, 2 *H.* 4. was revived, but afterwards repealed, 10 *Eliz.*

28. *Note*, King *John*, in the time of his Troubles, granted by his Charter 13 *Maii, Anno Regni* 14. submitted himself to the Obedience of the Pope. And after in the same year by another Charter, he resigned his Crown and Realm to Pope *Innocent* and his Successors, by the hands of *Pandulph* his Legate, and took it of him again to hold of the Pope; which was utterly voyd; because the Dignity is an inherent, inseparable to the Royal Blood of the King, and descendable, and cannot be transferred. Also the Pope was an Alien born, and there-

therefore not capable of Inheritance in *England*: By colour of which Resignation, the Pope and his Successors exacted great Sums of the Clergy and Layety of *England* *pro commutandis pœnitentiis*. And to fill his Coffers, Pope *Gregory* the 9th. sent *Otho Cardinalis de Carcere Tulliano* into this Realm, to Collect Money, who did Collect infinite Sums, so that it was said of him, *Quod Legatus saginatur bonis Angliæ*, which *Legate* held a Councel at *London*, *Anno Dom.* 1237. & 22 *H.* 3. and for finding out Offences which should be redeemed with Money; with the assent of the *English* Bishops, he made certain Canons, among which, one was, *Jusjurandū Calumniæ in causis Ecclesiasticis cujus libet, & de veritate dicenda in spiritualibus quoque ut veritas facilius aperiatur, &c. Statuimus de Cætero præstari in regno Angliæ secundum Canonicas & legitimas Sanctiones obtenta in contrarium consuetudine non obstante, &c.* By which Cannon it appears, That the Law and Custom of *England* was against such Examinations; so that this was a new Law, and took its effect *de cætero*.

2. *Obtenta in contrarium, consuetudine non obstante*: And this agrees with the Register and Treaties, *de Regia prohibitione*, and the other Authorities. And it appears in *Linwood*, cap. *jurejurandi*, fol. 8. 9. That *Boniface*, Archbishop of *Canterbury*, 1272. & 57 *H.* 3. made this Cannon, *Statuimus quod Laici de subditorum peccatis, &c. per prælatos & judices Ecclesiasticos inquiratur, ad præstandum de veritate dicenda Sacramentum per excommunicationis sententias, si opus fuerit, compellantur impedientes vero ne hujusmodi juramentum præstetur, per interdict. & excommunicationis*. In which Cannon it is to be noted, That it extends to Lay-People: And note, *Linwood* saith, cap. *Jurejurandi, fol. 6. litera, E. Hic dicitur causa editionis hujus, &c. Prælati, &c. procedebant ad inquirendum de criminibus, &c. & Laici (nota hic) cessante potestate dominorum in hujusmodi inquisitionibus nolebant jurare de veritate dicenda.* 109, 10. 109. L.

Note,

29. 1. *Note*, Why Lay-people refused to be examined for Crimes and Excess.

2. The Judges of the Common-Law, by their Prohibition, did interdict, &c. as appears by their Register and other Authorities in *El.* 1. time, &c.

3. That where by the Law they may examine Lay-people upon Oath, *in causis matrimonialibus & testamentariis*; Here *Boniface* makes the Canon to extend to *Peccata & excessus*, which Canon was utterly against the Law and Custom of *England*. See another at the same time in *Lindwood: Cap. de Benef. fo.* 231. And this is declared by Act of Parliament, made 9 *El.* 2. called, *Articuli Cleri; si Prælati imponant pœnam pecuniariam alicui pro peccato, &c. Regia prohibitio locum habet.*

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29. Trin. 5 Jac. Regis. *Case concerning Pardons.*

The Law so regards the Weal-publike, that though the King shall have the Suit solely in his Name for the redress of it; yet by his Pardon he cannot discharge the Offender, because it is not onely in prejudice of the King, but in damage of the Subjects: If a man ought to repair a Bridge, and for default of Reparation, it fall to decay; in this Case, the Suit ought to be in the King's Name, and he is sole Party to it, but for the benefit of his Subjects: And if the King pardon it, yet the Offence remains; but peradventure the Pardon shall discharge the Fine for the time past. And with this agrees 37 *H.* 6. 4. *b. Plow. Com.* in *Nichol's* Case 487. A *multo fortiori* in case of Depopulation: for this is not onely an Offence against the King, but against all the Realm; for by this the Realm is infeebled, and therefore Depopulation and Diminution of Subjects, is a greater Nusance than the hindrance of Subjects, in their good and easie passage by any Bridge or High-way. And for this, notwithstanding the King's Pardon, he shall be bound to re-edifie the Houses

Houses of Husbandry which be depopulated; and though for the time before the Pardon, perchance he shall not be Fined, yet without doubt he shall for the time after: For the Offence it self cannot be pardoned, as in Case of a Bridge or High-way, because it is *malum in se*. But this continues as to the Fine and Imprisonment, at all times after the Pardon: But the Penalty inflicted by the Statute may be discharged, *Quia prohibitum*, *Vide* 3 Ed. 3. *Tit. Ass.* 443. But when the King chargeth his Subjects for the making of a Bridge, or Cawsie, or Wall, &c. there the King may discharge the *Pontage*, *Murage*, &c.

Note, If one be bound to the King in a Recognizance to keep the Peace, in this Case, the King, before the Peace broken, cannot pardon and release the Recognizance, as 'tis agreed 11 *H.* 4. 43. 37 *H.* 6. 4. 1 *H.* 7. 10. because it is made for the Safety of the King's Subjects.

Note, No Licence can be made to do any thing that is *Malum in se*, but *Malum prohibitum*, 11 *H.* 7. 11. 3 *H.* 7. 3. 39 *H.* 6. ~~39~~ 63.

Trin. 5 Jacobi Regis, *Case of Commissions.* 30.

Note, Commissions in *English*, under the Great Seal, were directed to divers Commissioners in the Counties of *Bedford*, *Bucks*. *Huntington*, *Northampton*, *Leicester*, and *Warwick*, to inquire of divers Articles annexed, which were also in *English*; to inquire of depopulation of Houses, converting Arable Land into Pasture, &c. the Commissioners onely to have power to enquire, not to hear and determine: By colour whereof, many Presentments wiere taken in *English*, and returned into the *Chancery*; and after, *viz.* *Trin.* 5 *Jac.* It was Resolved by the two Chief Justices, *Walmesly*, *Fenner*, *Yelverton*, *Williams*, *Snig*, *Altham*,

Althum, and *Foster*, that the said Commissions were against Law, for three Reasons.

1. Because they were in *English*.

31. 2. Because the Offences inquirable, were not certain in the Commission, but in a Schedule annexed.

3. Because, that it was onely to enquire, which is against Law; for so a man may be unjustly accused or defamed, and shall have no Remedy nor Traverse to it; for it is not within the Statute of the 5 *Eliz.* At Common-Law Assizes were not taken, but before Justices in *Eyre* (who sit *virtute brevis*, every seventh year; *Vid. Britton. fo.* 1. and *Bracton, lib.* 5. and 11.) or in the Common-Pleas: And because this was a great trouble, it was provided by *Magna Charta*, cap. 30. *Quod recognitiones de nova disseizina, & de mort' d'ancester non capiantur nisi in propriis Comitatibus*, &c. And after by the Statute of *Westminster* 2. *cap.* 30. it was provided, *Quod assignentur duo Justiciarii jurati coram quibus et non aliis capiantur assiz. ad plus ter per annum.* By which Act, Justices of *Nisi Prius* were constituted of other Pleas, as well of one Bench as the other, *Coram quibus*, &c. And by the same Act, Justices of *Nisi Prius* may give Judgment in Assizes of *Darreine presentment*, and *quare Impedit*. Then came the Statute 27 *Ed.* 1. *de finibus*, cap. 4. and provided, that *inquisitiones et recognitiones capiantur tempore vacationis*, generally before *aliquo Justiciario de utroq; Banco, coram quibus*, &c. And after by the Statute of *York*, cap. 3. It is provided, That in Plea of Land, *Nisi Prius* shall be taken before one of the Justices, &c. and *Cap.* 4. That no other Pleas moved by Attachment or Distress, shall be taken before any Justice, &c. By the 14 *Ed.* 3 *cap.* 16. *Nisi Prius* may be taken in any Plea before two; so one be Justice of one Bench, or Chief Justice, or Serjeant sworn.

By the Statute *de finibus cap.* 3. *Justiciarii ad assizas capiend. assignati deliberent Gaolas in Com. illis, &c. vide de recitat. del Stat.* 28 Ed. 1. *de appellat.* which recites the

the Statute *de felonia*: Felony formerly included Treſpaſs, *vide Stamf.* 57. 3 H. 8. *cap.* 7. gives power to Juſtices of Aſſize, to hear and determine Treaſon, concerning falſe Money, 14 H. 6. *cap.* 1. gives Juſtices of *Niſi Prius* power in all Caſes of Felony and Treaſon to give Judgment. 28 *Ed.* 1. *De appellatis*, gives Juſtices of Aſſize power to try Appeals of Approvers.

They may alſo by the 34 and 35 H. 8. *cap.* 14. write to the Clerk of the Crown, *de Banco R.* to certifie the firſt Conviction in their own Name; otherwiſe the beſt Form is in the King's Name, 2 and 3 *Ed.* 6. *cap.* 24.

By *Articuli ſuper chartas*, *cap.* 10. & 4 *Ed.* 3. *cap.* 11. & 7 *R.* 2. *c.* they may hear and determine Conſpiracies, falſe Informations, &c. By the Statute of *Northampton*, 2 *Ed.* 3. *cap.* 3. they may hear and determine the Statute of Armor, and puniſh Juſtices of Peace and others, &c. 32.

They ought twice a year to proclaim the Statute, 32 H. 8. and other Statutes, againſt Champerty, Imbracery, and unlawful Retainers.

By 3 H. 7. *cap.* 1. they may take Bail of one acquitted of Murther within the year, to anſwer the Appeal of the Party. *c.* 9.

By 33 H. 8. they muſt proclaim in their Circuit the Statute againſt unlawful Games. They make Execution of the Statute 13 H. 4. *cap.* 7. of Ryots, &c. And by 2 H. 5. *cap.* 8. Commiſſion ſhall be awarded, to enquire of the Defaults of Juſtices of Aſſize, and of the Peace.

By *Weſtminſter* 2 *cap.* 39. and 2 *Ed.* 3. *c.* 5. they ought alſo to enquire of the 23 H. 6. *cap.* 10. concerning Sheriffs, &c. Bayliffs, &c. and Guardians of Priſons, for their Extortion, and delivering who are not Bailable, and detaining who are, 3 *Mariæ*, *Dyer* 99. they held Plea in Aſſize of Murther, by [illegible] and 3 H. 7. *c.* and of Robbery, by Commiſſion of Gaol Delivery. By 23 *Ed.* 3. they may inquire of Default, &c. & puniſhment of Victuallers, &c.

Note,

Note, Justices of *Oyer and Terminer* can only enquire of such who are endicted before themselves; But Justices of Goal-delivery may arraign a Prisoner indicted before others; the words of their Commission are, *Ad Gaolas, Gaolam de B. de prisonaribus in ea existent. hac vice deliberand. secund. leges, &c. Brook* tit. Commission, 3. *Marie* 24. 4 *Ed.* 3. *cap.* 2. Justices of Gaol-delivery deliver Prisoners indicted before Guardians of the Peace. And by 1 Ed. 6. cap. 7. new Commissioners of Gaol-delivery. This extends not to Indictments, &c. before Commissioners of *Oyer and Terminer*, because the proceedings before Justices of *Oyer and Terminer*, after the *Oyer* determined, ought to remain in the Kings Bench: But the Records before Justices of Gaol-delivery remain with the *Custos Rotulorum*, vide *Brook.* tit. Commission 12. 38 H. 8. Title *Oyer and Terminer*; 44 Ed. 3. 32. 43.

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32. *Case of Customes, Subsidies, and Impositions.*

Upon Conference between *Popham*, chief Justice, and my self, upon a judgment lately given in the Exchequer, and upon Consideration of our Books and Statutes. It appeared, That the Rule of the Common-Law is the the Register; Title *ad quod dampnum & F. N. B.* 222. *a. quod patria magis solito non oneretur nec gravetur.* Also another Rule, That the King may Charge his People to a thing which may be to their Profit, without assent of the Commons, but not to their Charge. As is held in 13 H. 4. 14. *& Statutum de Tallagio non concedendo, &* Mag. Chart. *cap.* 30. which hath been confirmed above 30 times, *Vide le Stat.* 25 *Ed.* 1. *c.* 7. 3 *Ed.* 1. *in turris*, 9 *Ed.* 3. *cap.* 1. 2. 14 *Ed.* 3. 2. 25 *Ed.* 3. *cap.* 2. Queen *Mary* put an Imposition upon Cloaths, which 1 *Eliz. Dyer*, 165. was moved, but not Resolved: *Vide* 31 H. 8. *Dyer, fol.* 43. *&* 1 *Eliz. Dyer*, 165. *Magna Custuma, & Parva Custuma: Vide* 9 H. 6. 12. *&* 35.

Upon

Upon all which, and divers Records by us seen, it appeared to us, That the King cannot at his Pleasure put any Imposition upon any Merchandize to be Imported or Exported, unless for advancement of Trade, the life of the Island, *Pro bono publico*. As if in Forraign Parts any Imposition is put upon the Merchandize of our Merchants *non pro bono publico*; to make equality, and advance Trade, the King may put an Imposition upon their Merchandizes, for this is not against any of the said Statutes; which was the Case of Currants lately adjudge in the Exchequr. And also of *Customer Smith* in Queen *Elizabeth*'s time. 33.

And it was clearly Resolved, That such Imposition, so put, cannot be demised or granted to any Subject, because it is to augment and decrease, or be quite taken away upon occasion.

And though the King may prohibite any person, in some Cases, with some Commodities, to pass out of the Realm, yet this cannot be where the end is Private, but where it is publick; because *Quam plurima nobis et Coronæ prejudicialia in partibus exteris prosequi intendit*; and to restrain in time of Dearth or War for *Necessitas est lex temporis*.

It appeared to us also, That at Common Law no Custom was paid, but only for Woolls, Woollfells, and Leather, which is called in *Magna Charta*, *Recta consuetudo*, all others are called, *Mala Toltneta*; which in the Statute *de Tallagio non concedendo*, is called *Maletot*. And it hath of long time been used by Parliament, to Grant to the Kings, at the beginnings of their Reigns, certain Subsidies of Tunnage and Poundage for term of Life, which began 2 & 3 *H.* 5. 31 H. 6. *cap.* 8. and 12 *Ed.* 4. *cap.* 3. which proves the King, by his own Power, cannot impose it; and this may be granted by the King, but the other not. *Vide* 31 H. 8. *Dyer* 43. 1 *Ma. D.* 92. 1 *Eliz. D.* 165. 2 *and* 3 *P. and M. D.* 128. 12 *Eliz. D.* 296. 23 *Eliz. D.* 375. 45 *Ed.* 3. *cap.* 4. 27 *Ass. pl.* 44. *Register* 192, *&c.*

34 *Vide Magna Charta, cap.* 30. They are called *Consuetudines*; *Et per vocabulum artis*; they are called, *Cuſtuma*: Vide *Leſtat.* 51 H. 3. Titl. Exchequer in *Raſtall.* and 9 *Ed.* 3. *cap.* 1.

Vide *Forteſcue de laud. leg. Ang. cap.* 36. *fol.* 48. & *fol.* 13. *cap.* 9.

And note, for the benefit of the Subject, the King may lay Impoſition within the Realm, to repair Highwayes, Bridges, and Walls for defence. But the ſum muſt be proportioned to the benefit. And this appears, 13 H. 4. 16. See alſo *Charta mercatoria ex Rot. mercator.* 31 Ed. 1. *n.* 42. *Patents*, 3 Ed. 1. *n.* 1. & 9. *de ſacco Lanæ dim. marcæ liſta Coriorum* 1 Marke, &c. *Fines* 3 Ed. 1. *n.* 24. *intus et non in dorſo: Vide Rot. Parl. an.* 13 Ed. 3. *And* 22 Ed. 3. *n.* 8. *And* 8 H. 6. *n.* 29. 28 H. 6. *n.* 35. 9 R. 2. *n.* 30. 29 Ed. 3. 11. *n. ex Rot. Parliam.* 5 Ed. 3. *n.* 17, 18, 19. 22 Ed. 3. *n.* 31. 5 Ed. 3. *n.* 163. 5 Ed. 3 *n.* 191. 38 Ed. 3. *n.* 26. *Rot. Parl.* 7 R. 2. *n.* 35, 36. 9 R. 2. *n.* 30. 2 R. 2. *Parl. apud Gloceſtriam. Act.* 25. 1 R. 2. *Parl. accord.* 1 R. 3. *againſt Benevolence. Vide Clauſ.* 4 Ed. 3. *n.* 22. *bis.*

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35. *Caſe of Libells between* Edwards *and* Wooton, *In Cam. Stellat.*

The Caſe was, That Doctor *Wooton* writ to *Edmunds* an infamous, malicious, ſcandalous, and obſcene Letter, with his Name ſubſcribed. And this he Sealed and directed to his Loving Friend, Mr. *Edward Speed*, this, and after the ſaid Doctor diſperſed to others a great number of Copies of the ſaid Letter.

And it was Reſolved by the Lord Chancellor *Egerton*, the two chief Juſtices, *et per totam curiam*, That this was a ſubtle and a dangerous kind of Libell: For though the writing of a private Letter, without other Publication, the Party to whom it is directed cannot have an Action

Action *Sur le Case*, but where it is publiſhed to others to the Plaintiffs Scandal, Action lyeth.

The Doctor thought this could not in any manner have been puniſh't; but 'twas Reſolved, That the infamous Letter, which in Law is a Libell, ſhall be puniſhed in the Star-Chamber, being an Offence to the King, and a motive to breach of the Peace: And in the Caſe at Bar, the diſperſing of Copies of it, aggravates the Offence, for which alſo the Party may have an Action *Sur le Case*.

Note, By the Civil Law, a Perſon diſabling himſelf to bear Office, or making a Libell againſt himſelf, ſhall be puniſhed: And though the Doctor ſubſcribed his Name to the ſaid Letter, yet it importing matter Scandalous is in the Law a Libell.

The Law of the *Lydians* is, That who ſlanders another, ſhall be let Blood in the Tongue; who hears it, and aſſents to it in the Ear, &c.

Mich. 5 Jac. *Regis*, *Wooton* and *Edwins* Caſe. 35.

In *Replevin*, the Defendant avowed, and the Plaintiff demurred, and the Caſe was thus;

William Hawes was ſeized in Fee of a Meſſuage and 55 Acres of Land, five Acres of Meadow, and ſix Acres of Paſture, *in Formanton in Com. Hereford.* and 27. *Junii*, 28 *H.* 8. by Indenture, demiſed the Tenement aforeſaid to *N. Traheron* for 79 years, *Reddendo inde annuatim præfato Gulielm. Hawes et aſſign. ſuis* 26 s. 8 d. at the Feaſts of the *Annunciation*, and St. *Michael*, by equal portions. And after the Leſſor dyed, and the Reverſion deſcended to *William* his Son, under whom the ſaid *John Edwin* Claimed. And the ſole Point was, If the Rent reſerved in this Caſe ſhall go to the Heir, or be determined by the death of the Leſſor.

If the Lessor had reserved the Rent to him without more, this shall determine by the death of the Lessor. And the addition of the word *Assignes* shall not enlarge the reservation; for the Assignes cannot have the Rent longer than the Lessor himself should have it. *Vide* 18 *Ed.* 3. *tit. Ass.* 86. 10 *Ed.* 4. 18. 27 *H.* 8. 19. *per Audly, et vide* Hill. 33 *Eliz. Rot.* 1341. In a Replevin, enter *Richmond* and *Butcher*; *Butcher* avowed for Rent as Heir to his Father, upon a Demise made by his Father of certain Lands, for 21 years, by these words, *Reddendo proinde durant. termin.* 21 *annos præfat.* (*Patri*) *executor et assignat. suis* 10 *l. legalis, &c. ad festa, &c.* And it was adjudged, That by this Reservation the Heir should not have the Rent, because the Reservation was to the Father, and his Executors, &c. not to his Heirs.

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36. Mich. 5 Jac. Regis, *Case concerning Buggary.*

The Letter of the Statute, 25 *H.* 8. *cap.* 6. If any Person shall commit the detestable sin of Buggary with Mankind or Beast, &c. it is Felony; which Act being Repealed 1 *Mar.* is revived and made perpetual 5 *Eliz. cap.* 17. and he lose his Clergy.

It appears by antient Authorities of the Law, That this was Felony, but they vary in the punishment. For *Britton*, who writ 5 *Ed.* 1. *cap.* 9. saith, That *Sorcerers, Sodomers, and Hereticks*, shall be burned: *F. N. B.* 269. agrees with it. But *Fleta lib.* 1. *cap.* 37. *Christiani Apostatantes, &c. debent comburi*, (this agrees with *Britton*) but *Pecorantes et Sodomitæ terra vivi infodiantur.* But in the *Mirror of Justice*, vouched in *Plow. Com.* in *Fogusses* Case; the Crime is more high, for there it is called *Crimen læsæ majestatis*, a horrible Sin against the King, either Celestial or Terrestial in three manners: 1. By Heresy, 2. By Buggary, 3. By Sodomy. Note, Sodomy

domy is with mankind, and is Felony, and to make that Offence, *Oportet rem penetrare et semen naturæ emittere et effundere*; for the Indictment is, *Contra ordinationem Creatoris et naturæ ordinem rem habuit veneream dictumq; puerum carnaliter cognovit*; and so it was held in the Case of *Stafford*, Pæderastes *amator puerorum*, Vide Rot. Parl. 50 Ed. 3. 58. So in a Rape there must be penetration, and emission of Seed, *Vide Stamf. fol.* 44. which Statute makes the Accessary Guilty of Felony.

West. 2. cap. 34. If a Man ravish a Woman, 11 *H.* 4. 13. If one Ayd another in a Rape, or be present, he is principle in the Buggary, Vide *Levit.* 18. 22. *et cap.* 10. 13. 1 *Cor.* 6.

Case of Premunire. 37.

In Doctor *Cosines* Book, intituled, *An Answer, &c.* and publisht 1584. And a Pamphlet lately publisht by Doctor *Ridley*, they would obtrude upon the World, That in regard by the Act 1 *Eliz. cap.* 1. all Spiritual and Ecclesiastical Power within the Realm is annexed to the Crown, and the Law thereof is the Kings Ecclesiastical Law; That therefore no *Premunire* lyes against any Spiritual Judge for any cause whatsoever; And the Reasons some of their Profession give to confirm it are,

1. That when the Statute of *Premunire* was made, the Pope usurped Ecclesiastical Jurisdiction, though *de jure* it belonged to the King: But now since the King as well *de facto* as *de jure* is Supream Head of all; The cause being changed, the Law is changed also.

2. The conclusion of the Writ of *Premunire* is *in Domini Regis contemptum et prejudicium et dictæ Coronæ et dignitatum suarum Læsionem et exhæredationem manifestam et contra formam statuti, &c.* which proves the Jurisdictions united to the Crown; and what is united to, and derived from

the Crown, cannot be said *contra Coronam et dignitatem Regis.*

3. The High Commission Court is the Kings Court, and therefore though it may be said, The Consistory Courts are *Curiæ Episcoporum*, yet that Court, by force of the High Commission, is the Kings, and so their Proceedings shall not be lyable to the *Premunire.*

4. This new Court is erected by Act of Parliament, &c. And because the Statute of *R.* 2. (a) speaks *de curia Romana seu alibi, &c.* This (*alibi*) cannot extend to a Court erected by Act of Parliament, 1 *Eliz.* But to these Objections it was answered and resolved by divers Justices in this Term, That without Question the Statutes of 27 *Ed.* 3. (b) 16 R. 2. &c. *de Premunire*, are yet in force. And all proceedings before any Ecclesiastical Judge, that were in danger of *Premunire* before 1 *Eliz.* are now in case of *Premunire* after the said Act, the said Acts of *Premunire* not being repealed by 1 Eliz.

1. 2. And as to first and second Objections, it was answered, That true it is, The Crown of *England* hath as well Ecclesiastical as Temporal Jurisdiction annex'd to it, as appears by the Resolution in *Cawdrys* Case from Age to Age. And though this was *de jure*, yet where the Pope became so Potent, he usurped upon the Kings Ecclesiastical Power in this Realm, but this was meer Usurpation. And therefore all the Kings of this Realm, *Totis viribus proinde*, for establishing of their Temporal Law, by which they inherit their Crown, and by which, &c. were alwayes jealous in any part or point it should be incroached upon; And if the Ecclesiastical Law did usurp upon the Temporal, it was severely punished, and the Offender judged an Enemy to the King by the ancient Statutes; and every one might have killed him before the Statute of 5 *Eliz.* (c) And this is the Reason, the Crown it self is directed descendable by the Common Law, and Treason against the Crown is punished by this Law. And therefore usurpation by an Ecclesiasti-

call

call Judge upon it, is said to be *contra Coronam et dignitatem Regis*: And all Prohibitions since 1 Eliz. do conclude *contra Coronam et dignitatem Regiam*; for as 'twas resolved by all the Justices, *Pasch. 4 Jac. Regis, est* 38.
contra Coronam, &c. when any Ecclesiastical Judge doth usurpe upon the Temporal Law, for the cause of the Subject is drawn *ad aliud examen*, when his Cause is not ended by the Common Law, whereto by Birth-right he is inheritable.

3. As to the Third, though the Court by force of High-Commission is the Court of the King, yet their proceedings are Ecclesiastical: And therefore if they usurpe upon the Temporal Law, this is the same offence which was before the Act, 1 Eliz.

4. As to the Fourth, though it be a new Court, yet the antient Statutes extend to it, in this word (*Alibi*) and in *H.* 8. times several new Bishopricks were erected; yet never any question, but the old Acts of *Premunire* did extend to them. But to answer all Objections at once, whereas the Act 1 Eliz. repealed the Statute 1 & 2 P. & *M. cap.* 8. yet there is an expres *Proviso* in the said Act 1 Eliz. That it shall not extend to Repeal any Clause or Matter contained in the 1 *et* 2 P. *M.* which in any sort concerneth any matter or cause of *Premunire*, but that all of that stand in force. See the said two Acts, and also 16 *R.* 2. Also the Act of 1 Eliz. revives the Act 25 *H.* 8. *cap.* 20. which makes a *Premunire* in a Dean and Chapter, &c. for not electing, certifying, or admitting a Bishop elected; by all which, it appears the said Act of 1 Eliz. never intended to take away the offence of *Premunire*.

But note in what Cases a *Premunire* lyes, and in what 39.
not.

1. In all Cause, when the Cause originally belongs to the Cognizance of the Ecclesiastical Court and Suit is prosecuted there, as belonging to their Cognizance, (though in truth (if rightly examined) it ought to be

determinted at Common Law) yet no *Premunire* lyes there, but a Prohibition. As if Tythes are severed from the nine parts, and are carried away; if the Parson sue for the Substraction of these Tythes in the Spiritual Court, this is not in the case of Premunire, *Vide* 10 *H.* 4. 2. agreeing with this Opinion. So if a Parson sue for Tythes of Lambs, surmising that they were *Sylvæ Cæduæ*, under the age of 20 years, where in truth they were above; yet a Prohibition lyeth, and no Premunire.

2. But though the Cause originally may appertain to the Cognizance of the Ecclesiastical Judge, yet if he sue for it in the nature of a Suit, which doth not belong to the Ecclesiastical Court, but to the Common Law, there a Premunire lyeth: As in the former Case, If the Parson after severing of Tythes, will in any Ecclesiastical Court sue for carrying away his Tythes from the 9 parts, which Action pertains to the Common Law: In such case both the Actor and Judge incurr the danger of Premunire. And so it was adjudged 17 *H.* 8. as *Spillman* Reports it: One *Turbervil* sued a *Premunire* against a Parson, that convened him into the Ecclesiastical Court, and there libell'd against him for taking of Tythes which were severed from the nine parts, and the Parson was condemned to be out of the protection of the King, to forfeit all his Lands, Goods, and Chattels, and his Body to perpetual Imprisonment, and damages to the Party. So of a Mortuary delivered and re-taken; if the Parson sue for this as for a Mortuary to him delivered, he is in case of *Premunire*, 10 *H.* 4. 2. So in the case put for tythe of Wood, if it appear by the Libell that the Cognizance of the Case doth not belong to Court Christian, the Premunire lyes, as you may see in the Book of Entries, *tit. Dismes, fol.* 221. But the tit. *Prohibition, fol.* 449. *Divisione Dismes*, Pl. 2, 3, 4, 5, & 6. If the Suit be *pro Sylva cæduâ, &c.* and the Suit be framed so as the Cognizance belongs to Court Christian, though the truth be otherwise; no Premunire, but a Prohibition lyes.

3. When

3. When the cause originally belongs to the Cogni- 40.
zance of the Common Law, and not to the Ecclesiasti-
cal Court; there though they Libel for it according to
the course of the Ecclesiastical Law, yet the *Premunire*
lyeth, because that this draws the cause which is deter-
minable at Common Law *ad aliud examen*, viz. to be
decided by the Civil Law, and so deprives the Subject of
the Common Law, his Birth-right; and with this agrees
the Book of *Entries*, *tit. Premunire*, *fol.* 229. *b.* & 430.
a. So that if the Original cause be Temporal, though
that they proceed by Citation, Libel, &c. in Eccles-
astical manner, yet this is in danger of *Premunire*. And
the reason of this is, because he endeavours to draw *Cog-*
nitionem quæ ad Curiam domini Regis pertinet ad aliud exa-
men; that is, that the Debt, the Cognizance whereof
belongs to the Court of the King; he intends by the
Original Suit to draw it to be determined by the Eccle-
siastical Court.

And note, In the Indictment of *Premunire* against
Cardinal *Woolsey*, *Mich.* 21 *H.* 8. 14. it is said, *Quod*
Prædictus Cardinalis intend. finaliter antiquissimas leges
Angliæ penitus subvertere et enervare, universumque hoc
Regnum Angliæ et ejusdem Angliæ populum, legibus imperia-
libus, vulgo dict. legibus Civilibus, et eorum legum Canonibus
in perpetuum subjugare, &c. And this included within
these words, *Ad aliud examen trahere, viz.* to decide
that by the Civil Law, which is determinable by the
Common Law. And upon this was a notable Case in
Hill. an. 25 *H.* 8. of *Nicholas*, Bishop of *Norwich*, against
whom, he then being in the Custody of the Marshall,
the Kings Attorney did prefer a Bill of *Premunire*, the
matter whereof was this, In *Thetford* in *Com. Norfolke*
hath been *de tempore cujus, &c.* such Custom that all
Ecclesiastical Causes rising in that Town should be de-
termined before the Dean of that Town, who hath parti-
cular Jurisdiction there, and that none in that Town
shall be drawn in Plea in any other Court-Christian,
unless

unless before the same Dean: And if it ought to be done against the same Custom, this to be presented before the Mayor of the same Town, and the Party to forfeit 6 s. 8 d. That One such sued in the Consistory of the Bishop for a thing arising within the said Town, which was presented before the Mayor, for which he forfeited 6 s. 8 d. The Bishop cited the Mayor to appear before him at his House at *Hoxin* in *Suffolk*, generally *pro salute animæ*, but upon appearance, libelled upon all the Matter, and enjoyn'd him on pain of Excommunication, to annul the said Presentment: The Bishop had Council assigned him, who objected, That as well the Presentment as Custom was void, and therefore not *contra Coronam, &c.* nor drawn by the Bishop *ad aliud examen.*

41. 2. They objected, That the Bishop's Court was not intended within the Act of 16 *R.* 2. but *in Cur. Romana aut alibi*, and this (*alibi*) ought not to be out of the Realm; but it was,

Resolved by *Fitz James*, chief Justice, *Et per totam Curiam*, That be the Custom or Presentment good or bad, this is a Temporal thing, determinable at Common Law, and not in Spiritual Court; and therefore the Bishop hath incurred the *Premunire.*

3. That *alibi* extends as well to the Bishop's Courts, &c. as well within the Realm, as else-where; and so the Court said it had been often adjudged: whereupon the Bishop confessed the Indictment. And Judgment was given, That he shall be out of the King's Protection, and that his Lands, Goods, and Chattels, should be forfeited, and his Body to be imprisoned *ad voluntatem Regis; &c.*

Nicholas

Nicholas Fuller's Case. *41.*

In the great Case of *Nicholas Fuller* of *Grays-Inn*, these Points were Resolved by all the Justices and Barons of the Exchequer.

1. Resolved, That no Consultation can be granted out of Term, because it is a final award of the Court; and can neither be granted in Term nor out of Term by all the Judges, except in Court; the name of the Writ signifying the same.

2. Resolved, That the Construction of the Statute 1 *Eliz. cap.* 1. and of the Letters Patents of High-Commission, in Ecclesiastical Causes, founded upon the said Act, belongs to the Judges of the Common Law: And therefore the Consultation which was granted with this restraint, *Quatenus non agat de authoritate et validitate Literarum Patentium pro causis Ecclesiasticis, vobis vel aliquibus vestrum direct. aut de expositione et interpretatione Statuti de anno primo nuper Reginæ, &c.* As if the King hath a Benefice *donative*, by Letters Patents; this shall not be visitable, nor deprivable by any Ecclesiastical Authority, but by the Chancellor of the King, or Commissioners under the Great Seal.

3. Resolved, When there is any Question concerning what Power or Jurisdiction belongs to Ecclesiastical Judges in any such Case, the determination of this belongs to the Judges of the Common Law, in what cases they have Cognizance, and in what not; And according to this Resolution, *Bracton, lib. 5. tract. de except. cap. 15. fol.* 412. *Vide* also *Entries fol.* 445. There was a Question, whether *Court-Christian* should have Cognizance of a Lamp, and a Prohibition was granted, *Quod non procedant in Curia Christianitatis, quousque in Curia nostra discussum fuerit utrum cognitio placiti illius ad Curiam nostram, vel ad forum Ecclesiasticum pertineat.* And all this

unless before the same Dean: And if it ought to be done against the same Custom, this to be presented before the Mayor of the same Town, and the Party to forfeit 6 s. 8 d. That One such sued in the Consistory of the Bishop for a thing arising within the said Town, which was presented before the Mayor, for which he forfeited 6 s. 8 d. The Bishop cited the Mayor to appear before him at his House at *Haxin* in *Suffolk*, generally *pro salute animæ*, but upon appearance, libelled upon all the Matter, and enjoyn'd him on pain of Excommunication, to annul the said Presentment: The Bishop had Council assigned him, who objected, That as well the Presentment as Custom was void, and therefore not *contra Coronam, &c.* nor drawn by the Bishop *ad aliud examen.*

41. 2. They objected, That the Bishop's Court was not intended within the Act of 16 *R.* 2. but *in Cur. Romana aut alibi*, and this (*alibi*) ought not to be out of the Realm; but it was,

Resolved by *Fitz James*, chief Justice, *Et per totam Curiam*, That be the Custom or Presentment good or bad, this is a Temporal thing, determinable at Common Law, and not in Spiritual Court; and therefore the Bishop hath incurred the *Premunire.*

3. That *alibi* extends as well to the Bishop's Courts, &c. as well within the Realm, as else-where; and so the Court said it had been often adjudged: whereupon the Bishop confessed the Indictment. And Judgment was given, That he shall be out of the King's Protection, and that his Lands, Goods, and Chattels, should be forfeited, and his Body to be imprisoned *ad voluntatem Regis; &c.*

Nicholas

Nicholas Fuller's Case. *41.*

In the great Case of *Nicholas Fuller* of *Grays-Inn*, these Points were Resolved by all the Justices and Barons of the Exchequer.

1. Resolved, That no Consultation can be granted out of Term, because it is a final award of the Court; and can neither be granted in Term nor out of Term by all the Judges, except in Court; the name of the Writ signifying the same.

2. Resolved, That the Construction of the Statute 1 *Eliz. cap.* 1. and of the Letters Patents of High-Commission, in Ecclesiastical Causes, founded upon the said Act, belongs to the Judges of the Common Law: And therefore the Consultation which was granted with this restraint, *Quatenus non agat de authoritate et validitate Litterarum Patentium pro causis Ecclesiasticis, vobis vel aliquibus vestrum direct. aut de expesitione et interpretatione Statuti de anno primo nuper Reginæ, &c.* As if the King hath a Benefice *donative*, by Letters Patents; this shall not be visitable, nor deprivable by any Ecclesiastical Authority, but by the Chancellor of the King, or Commissioners under the Great Seal.

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this appears in our Books, that the Judges of the Common Law shall determine in what Cases the Ecclesiastical Judges have Power to punish any *pro Læsione fidei* 2 *H.* 4. *fol.* 10. 11 *H.* 4. 88. 22 *Ed.* 4. 20. or of the bounds of Parishes, 5 *Ed.* 3. 8. 8 *Ed.* 3. 69. 70. 18 *Ed.* 3. 58. 12 *Ed.* 4. 9 *H.* 7. 1. 10 *H.* 7. 9. And therefore in this Case of *Fuller*, one other Restraint was added in the Consultation, *Et quatenus non agat de aliquibus scandalis, contemptibus seu aliis rebus quæ ad communem legem, aut Statuta Regni nostri Angliæ sunt punienda et determinanda.*

42. 4. Resolved, That if a Councellor at Law, in his Argument, shall scandal the King, or his Government, Temporal or Ecclesiastical, this is a misdemeanor, and and contempt to the Court; for which he shall be indicted, fined, and imprisoned, but not in *Court Christian*; but if he publish any Heresy, Schisme, or erroneous Opinion in Religion, he may for this be punished by the Ecclesiastical Judges; for the Rule is, *Quod non est juri consonum, quod quis pro aliis quæ in Curiis nostris acta sunt, querum cognitio ad nos pertinet, trahatur in placitum in Curia Christianitatis.* See the Book of Entries, *fol.* 448. And for this cause a Consultation was granted, *Quod Schismata, Hereses, &c.* Vide *Mich.* 18 *H.* 8. *Rot.* 78. *in Banco Regis.* The Case was, a Leet was held *Jovis post Festum Sancti Mich. Arch.* 17 *H.* 8. of the Prior of the House of St. *John de Bethelehem de Shene* of his Mannor of *Levisham* in *Com. Surrey* before *John Beare*, Steward there; a Grand Jury was charged to inquire for the King of all Offences inquirable within the said Leet, where one *Phillip Aldwin*, who was a resident within the said Leet, appeared, *Idem Phillippus sciens quandam Margaretam uxorem Johannis Alwin apud East-Greenwich infra jurisdictionem Letæ præd. pluries per antea corpus suum in adulterio viciose exercuisse, &c. eisdem sic juratis de dicta, &c. informationem veraciter dedit.* Upon which the said *Margaret* drew the said *Phillip* into the Archbishop of *Canterbury* his

his Court, and there libelled against him for defamation of Adultery; and that the *Phillip* said *in hisce Angl. verbis*, [*Margavet Allen* is a Whore and a Bawde, and it is not yet three weeks agone since a man might take a Priest betwixt her Legs,] which words were parcel of the words by which he informed the Jury at the Leet: And upon this he had a Prohibition; and by this Record it appears, and by the Statute, 18 *Ed.* 3. *c.* 11. that Indictors of Lay-People, or Clerks, in Turneys, and after delivering them before Judices, shall not be sued for Defamation in *Court-Christian*, but that the Plaintiff grieved shall have a Prohibition, *Vide Pasch.* 6 *Eliz.* In the Lord *Dyers* Reports (which Case is not Printed); *John Halles* in the Case of Marriage between the Earl of *Hereford*, and the Lady *Katharine Gray*, declared his Opinion against the Sentence given by Commissioners of the Queen in a Cause Ecclesiasticall, under the Great Seal, [That the said Sentence was unjust and wicked, and that he thought the Delegates had done against their Conscience;] and what offence this was, was referred to divers Judges to consider, by whom it was *Resolved*, That this Offence was a contempt as well against the Queen as to the Judges, and punishable by the Common-Law, by Fine and Imprisonment.

5. Resolved, When any Libell in Ecclesiastical Court, contains many Articles; if any of them do not belong to *Court-Christian*, a Prohibition may be generally granted, and upon motion, Consultation may be made as to things which belong to Spiritual Jurisdiction: And for these Reasons, it was Resolved by all, That the Prohibition in the case at Bar was well granted, which in truth was granted by *Fenner* and *Crooke*, Justices, in the Vacation. 43.

Note these general Rules concerning Prohibitions; *Quæ sparsim inveniantur in libris nostris.*

Non debet dici tendere in præjudicium Ecclesiasticæ libertatis quod rege et repub. necessarium videtur, Artic. Cleri. 6. 8. 44.

(2.) *Non est juri consonum, quod quis, super iis quorum cognitio ad nos pertinet, in Curia Christianitatis trahetur in placitum*, Entries 444. 447.

(3.) *Episcopus teneat placitum in Curia Christianitatis de iis quæ mere sunt Spiritualia: Circumspecte agatis, &c.*

(4.) *Prohibeatur de cætero Hospitalariis et Templariis, ne de cætero trahant aliquem in placitum coram conservatoribus privilegiorum de aliqua re cujus cognitio ad Forum spectat Regium.* West. 2. cap. 43.

(5.) *Non concedantur citationes priusquam exprimatur super qua re fieri debet citatio. Ibidem.*

6. Resolved, That this special Consultation being only of Heresy, Schisme, and erroneous Opinions, &c. that if they convict *Fuller*, and if he recant the same, &c. that he shall never be punished by Ecclesiastical Law: After the Consultation granted, the Commissioners proceeded, and convicted *Fuller* of Schisme and erroneous Opinions, and imprisoned and fined him 200 l. And after in the same Term *Fuller* moved the Court of Kings Bench, to have a *Habeas Corpus*, *et ei conceditur*; upon which Writ the Goaler did return the cause of his detention.

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44. Mich. 5 Jac. Regis. *The Case of First-Fruits and Tenths.*

Note, *Annates*, *Primitiæ* and First-Fruits are all one: It was the value of every Spiritual Living by the year, which the Pope, claiming the disposition of all Ecclesiastical Livings, reserved. And those, and Impropriations began about the time that *Polidore Virgil*, *lib.* 8. *cap.* 2. saith, Vide *Concilium Viennense quod Clemens quintus indixit pro annatibus.*

These First-Fruits were given to the Crown, 26 H. 8. *cap.* 3.

Note,

Note, Hill. 34 *Ed.* 1. *An.* 1307. At a Parliament held at *Carliſle*, great Complaint was made of Oppreſſions of Churches, &c. by *William Teſta* (called *Mala Teſta*) and Legate of the Pope; in which Parliament, the King, with his Barons aſſent, denied payment of Firſt-Fruits; And to this effect he writ to the Pope: whereupon the Pope relinquiſhed his Demand, and the Firſt-Fruits for Two years were by that Parliament given to the King.

Decimæ, id eſt, Tenths of Spiritualties were perpetual, and paid to the Pope, till Pope *Urban* gave them to *R.* 2. to aid him againſt *Charles*, King of *France*, and others who ſupported *Clement* the 7th. againſt him. 45.

5 *H.* 3. By the Popes Bulls all Tenths were paid to *H.* 3. for years: Theſe were given to the King, 26 *H.* 8. *cap.* 3.

Vide *Lambert de priſt Anglor. &c.* fol. 128. cap. 10. *et ibidem inter leges Jnæ*, fol. 78. cap. 4.

Sir Anthony Roper's *Caſe*. 45.

In the Caſe of Sir *Anthony Roper*, drawn before the High Commiſſioners, at the Suit of one *Bullbrook*, Vicar of *Bentley*, for a Penſion out of a Rectory Impropriate, whereof Sir *Anthony* was ſeized in Fee: And the High-Commiſſioners ſentenced the ſaid Sir *Anthony* to pay it, which he refuſed; whereupon they committed him to Priſon, who appeared in Court this Term by *Habeas Corpus*; upon the return of which Writ, the matter did appear: And it was well debated by the Juſtices, and Reſolved:

1. That the ſaid Commiſſioners had not Authority in the ſaid Caſe; for when the Acts of the 27 *H.* 8. and 31 *H.* 8. of Monaſteries, had made Parſonages Impropriate, &c. although that Penſions were ſaved, yet by the Preamble of the Act, 34 *H.* 8. *cap.* 19. thoſe to whom

whom the Penſions appertain, had not remedy for the ſaid Penſions, &c. And if the King covenanted to diſcharge the Patentee, &c. of Penſions, the Suit ſhall be made for the ſame in the Court of Augmentations, and not elſe-where: And if High-Commiſſioners will determine of Penſions, they muſt do it by that Act, 34 *H.* 8. which expreſly gives it to Ordinaries, and their Officials; the High-Commiſſioners Power being granted long after by the Act, 1 *Eliz.*

But it was Objected, That that Act of 1 *Eliz.* gave the Queen and her Succeſſors Power to aſſign Commiſſioners, &c. And it was ſaid, That ſuch Spiritual Juriſdiction which the Biſhop ſhould have, is transferred to the High Commiſſioners.

46. But it was unanimouſly reſolved by *Coke*, *Walmeſly*, *Warberton*, *Daniel*, and *Foſter*, Juſtices, That the Act 1 *Eliz.* extends not to this Caſe for divers Cauſes.

1. Becauſe the Act of the 1 *Eliz.* doth not take away nor alter any Act of Parliament; but thoſe onely which are expreſly named therein: And it was Reſolved, That the High-Commiſſioners cannot hold Plea for the double value of Tythes carried away before ſeverance.

2. Becauſe the words in the 1 *Eliz.* are [which by any manner of Spiritual Juriſdiction can or lawfully may be reformed.] And it appears, That theſe words extend to Crime only, and not to Caſes of Intereſt betwixt Party and Party.

3. Becauſe this Juriſdiction was given to the Biſhops by Act of Parliament, *viz.* 34 *H.* 8. which is more Temporal than Spiritual, as all Parliament are.

4. It was not the intent of the Act 1 *Eliz.* which revived the Statute, 23 *H.* 8. *cap.* 9. That the High-Commiſſioners, for private Cauſes, ſhall ſend for Subjects out of any part of the Realm; and ſo in effect confound the juriſdiction of the Ordinary, an Officer ſo neceſſary, that the Kings Courts cannot be without him in divers Caſes.

5. If

5. If that Act 1 *Eliz.* had extended to give High-Commissioners power to determine *meum et tuum*, as Pensions, Tythes, &c. the Party thereby also should have benefit to appeal, otherwise this should be dissolve the Court of the Ordinary, which is so antient and necessary in many Cases, that without it Justice cannot be administred.

6. The High-Commissioners cannot extend themselves but only to Crime.

Mich. 5 Jac. *Regis*, *Rot.* 2254. 47.

Præcept. fuit Guardiano priſon. Domini Regis de Fleete, quod haberet apud Weſtm. immediate, &c. Corpus Anthonii Roper *Mil. inpriſon. præd. ſub cuſtod. a ſua detent. quocunque nomine cenſeretur, una cum die & cauſa, &c. Et idem Juſticiarii hic viſa cauſa illa, ulterius fieri fecerint quod &c. Et modo hic ad hunc diem,* viz. *diem Sab. prox. O. St. Sanct. Mich. iſto eorum termino venit præd.* Anthonius *in propria perſona ſua ſub cuſtod. præd. Guard. ad Barr. hic. præd. & idem Guardianus tunc hic mand. Quod ante advent. brevis præd.* v z. 9. *die O. nlt. præter. præd.* Anthonii Roper *mil. reducit ſe priſon. præd. perantea Commiſſus virtute cujuſdam warranti dat.* 30 *die Junii ult. præter. quod ſequitur in hæc verba,* v z.

These are in his Majesties Name to require and charge you by Vertute of his High Commission, for causes Ecclesiastical, under the Great Seal of *England* to us and others directed, that herewith you receive and take into your Custody the Body of Sir *Anthony Roper* Knight, and him safely detain, &c. signifying unto you, That the cause of his Commitment, for that there being a certain cause, &c. betwixt him the said Sir *Anthony Roper* and *John Bullbrooke* Vicar of *Reatly*, for that he detained wrongfully from him the said Vicar, a certain yearly

Penſion, &c. Given at *Lambeth*, this thirtieth of *June*, 1607.

Et quod hæc fuit cauſa captionis et detentionis præd. Anthonii *in priſon. præd. corpus tamen præd.* Anthonii *modo hic paratus habet prout &c. ſuper quo viſis præmiſſis & per Juſticiarios hic plenius examinatis, videtur iiſdem Juſticiariis hic quod præd. cauſa Commiſſionis præd.* Anthonii *priſon. de Fleet præd. in retorn. ſpecificat. minus ſufficiens in lege exiſtit, &c. Ideo præd.* Anthonius *a priſona præd. per Cur. hic dimittitur, ac idem Guardianus de hujuſmodi Cuſtodia per eand. Cur. hic plene exoneretur.* And this was reſolved *una voce* by *Cok*, chief Juſtice, *Walmeſly*, *Warberton*, *Daniel*, and *Foſter*, Juſtices.

And in the ſame Term in *Lane's* Caſe, A Parſon in *Norfolk*, that ſued one of his Pariſhioners before the High Commiſſioners for Scandal, in ſaying only in the Church on a Sabbath day, That *he was a wicked man, and an arrant Knave*. Prohibition lyes for this, That it was not ſo enormous as the Statute intended.

48.

Hill. 5 Jac. Regis.

Note, It was moved to the Juſtices this Term, upon conſideration of the Acts of 34 *H.* 8. and 18 *Eliz.* If the Juſtices in *Wales* may be Conſtituted by Commiſſion, and it was conceived they could not, but that it ought to be by Patent, as hath been ever uſed ſince 34 H. 8. Then it was moved, If the King by force of a Clauſe therein might do it; which Clauſe is, That the King's moſt Royal Majeſty ſhall and may at all times hereafter change, adde, alter, miniſh, and reform all manner, &c. And it ſeemed to divers of the Juſtices, that this Power given to the King, determin'd by his Death for divers Cauſes.

1. Be-

1. Becauſe it wants theſe Words, *His Succeſſors*; and to draw it in Succeſſion, by Conſtruction, would be againſt the Intention of the Makers of the Act: For they gave this high Power of Alteration, &c. of Laws, to the King, as to his moſt Excellent Wiſdom ſhall be thought moſt meet; which words want *His Succeſſors*: For they well knew, his Wiſdom did not go in Succeſſion, ſo the Power went not in Succeſſion: And for this that *Eorum progreſſus oſtendent multa quæ ab initio provideri non poſſunt*: And what enſues upon this, concerning this uniting of *Wales* and *England* none could divine. But it was never the Intention of the ſaid Act, to give Power to the King and his Succeſſors for ever to alter, &c.

2. Power of Alteration of Laws, &c. is a Point of Confidence, concerning the Adminiſtration of Juſtice; which the Act, by omitting of his Succeſſors, intended to unite this Confidence to the Perſon of H. 8. and not to extend it without Limitation of time to his Succeſſors, 1 *Ed.* 5. 1. 1 *H.* 7. 1. 14 *Ed.* 4. 44. All Commiſſions concerning Adminiſtration of Juſtice, determine by the King's Death: Not ſo, if he make a Leaſe *durante bene placito*, or preſent one to a Church; theſe are not void by his Death, untill revoked by his Succeſſor. And upon Certificate of the Juſtices Opinion, That the Juſtices of *Wales* cannot be Conſtituted by Commiſſion, Baron *Snig* had a Patent for the Circuit of *Wales*, as others before him had.

Trin. 6 Jac. *Regis.* 49.

This Term it was Reſolved, *per totam Curiam in Communi Banco*, viz. *Coke* Chief Juſtice, *Walmeſly*, *Warberton*, *Daniel*, and *Foſter*, in the Caſe of *Allan Boll*, That the High-Commiſſions cannot by force of the Act, 1 *Eliz. cap.* 1. ſend a Purſivant to Arreſt any Perſon ſubj & to their Juriſdiction, to anſwer to any matter before them:

But they ought to proceed according to Ecclesiasticall Law by Citation: And in the Circuit of *Northampton*, when the Lord *Anderson* and *Glanvile* were Justices of Assize, a Pursivant was sent by the Commissioners to Arrest the Body of a Man to appear before them; and in resistance of the Arrest, and striving among them, the Pursivant was killed. And if this was Murther, or not, was doubted: and it was Resolved, that the Arrest was *tortious*, and by consequence, that this was not Murther, (though the killing of an Officer of Justice (whose Authority is lawful) in Execution of his Office is Murther. But they may send Citation by a Pursivant, and upon default proceed to Excommunication, and then to have a *Capias Excommunicatum*; which Writ, *de excommunicato capiendo*, is preserved and returnable by the Statute 5 *Eliz.* See *Magna Charta*, and all the antient Statutes: *Vid. Rast.* Title *Accusation*.

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49. *Marmaduke Langdale's* Case.

In the Case of *Marmaduke Langdale* of *Leventhorp*, in the County of *York*, by *Joan* his Wife, being sued for maintenance before the Bishop of *Canterbury*, and others High-Commissioners: It was Resolved, *per totam Curiam, præter Walmesly*, that a Prohibition before granted, was well maintainable; because it was not any Enormity nor Offence within the Statute, but a neglect of his duty, and a Breach of his Vow of maintenance: And the Rule of the Court was, That the Plaintiff shall count against the High-Commissioners, and upon Demurrer joyned the Case to be argued and adjudged; and the Party grieved, to have a Writ of Errour, *si sibi viderit expedire*, &c. Upon Complaint made to the King and Counsel, by the Lord President of *Wales*, and the Lord President of *York*, against the Judges of the Realm; and the King's Pleasure signified to them: Upon Consider-

50.

ra-

ration had of the parts of the Complaint, they Resolved upon these Answers: And because the Lord President of *York* first opened the Cause of his Grief more amply, they first answered those Objections, made on the behalf of that Councel: And first, as to the Institution of that Court.

1. After the Suppression of all Religious Houses, *Anno* 27. *H.* 8. in *October* 28. *H.* 8. there was an Insurrection of the Lord *Hussey*, and 20000 Men in *Lincolnshire*, about Religion, which was appeased by the Duke of *Suffolk*.

This was no sooner over, but 40000 Men under Sir *Robert Aske*, made a Commotion in *Yorkshire*. Soon after was a great Rebellion in *Lancashire*, *Westmerland*, *Cumberland*, and *Northumberland*, which the Earl of *Derby* quieted. Then *Musgrave*, *Tilby*, and others, assaulted *Carlisle* Castle, and were overthrown by the Duke of *Norfolk*: Soon after, Sir *Francis* Pigot Rebelled at *Setrington* in *Yorkshire*. Soon after, the Lord *Darcy*, &c. began a Commotion about *Hull*, appeased by the Duke of *Norfolk*. And all these Rebellions were between the 28. of and 30. of *H.* 8. in which time, many of the Rebels were Executed. And the King having effected in the 31 year of his Reign, the Suppression of the greater Houses of Religion, he established a Councel there for the quiet of the Counties of *Yorkshire*, *Northumberland*, *Westmerland*, *Cumberland*, *Durham*, the Counties of the City of *York*, *Kingston* upon *Hull*, and *Newcastle* upon *Tyne*, for preventions of Ryots, &c. And in this time of Necessity, the King Armed the President and Councel with two Authorities in one Commission. The one, A Commission of *Oyer and Terminer*, *de quibuscunq; Congregationibus & conventiculis illicitis coadjutoribus, Lolardiis, &c. per quæ pax & tranquilitas subditorum nostrorum Comitatibus, &c. prædict. gravat. &c. secundum legem & consuetudinem regni nostri Angliæ, &c.*

51. The other Authority was, *Nec non quascunq; actiones reales seu de libero tenemento, & personales, causasque debitorum & demandorum quorumcunq; in Com. &c. præd. quando ambæ partes vel altera pars sic gravata paupertate fuerit quod commode Jus suum secundum legem Regni nostri aliter prosequi non possit, &c.* And this was the Authority that the President and Councel had at first, without any private Instructions, as appears by the Commission under the Great Seal, 31 H. 8. *6 pars* Roberto Landavensi *Episcopo Presidenti Consilii & aliis:* out of which these things were observed.

1. That the intention of the Commission was, *Quod pax subditorum & tranquilitas preserventur.*

2. That they hear and determine Riots, Routs, &c. according to Law, or their Discretions; which without question was no otherwise intended, but that they should proceed according to Law; for that is *summa discretio*, and not according to private Conceits for *talis discretio discretionem confundit:* so the other Clause concerning real and personal Actions, in all the Counties and Places aforesaid, was onely *ad faciendum populum*, for it was utterly void in Law.

1. Because no such general Authority granted, may be made by the Commission of the King, to hear and determine all reall Actions within such a County according to Law, as he may by Charter in a particular County or place: As it was Resolved in *Scrogges* Case, *An. 2 Eliz. fo.* 175. in *Dyer:* Vid. *Dyer* 236. But the King by Letters-Patents may grant to a Corporation in such a Town, *Tenere placita realia, personalia & mixta.* And none can by this be prejudiced; for the proceeding ought to be according to Law; and if they erre, a Writ of Error lies. See *Magna Charta, cap.* 12. and *Westm. 2. cap.* 30. which Acts give Authority to Justices of Assize in their proper Counties; whereby it appears, that without an Act of Parliament, the King by Letters Patents cannot authorize Justices *De Assize capiend.* to take them

them in another County. As a Justice of one Bench, or other, ought to be made by Commission, not by Writ, yet he may be discharged by Writ, 5 *Ed.* 4. 32. But Justices in Eyre are by Writ, *Bracton, lib* 3 *c p.* 11. *& Britton, fo.* 1. Also, *Westm.* 2. *cap.* 30. and of *York, cap.* 4. *& sic de ceteris.*

Also it was observed, that at first the Commission extended onely when one or both Parties were so poor, as they were not able to prosecute at Law. Also they had no power to grant Injunctions: and lastly, their Commission was a Patent under the Great Seal, and enrolled in *Chancery*. And thus much was said concerning the first Institution of the Court: 52.

2. That our Proceedings in granting Prohibitions, is for matter justifiable by Law.

As to this, whereas at first their Authority was Patent, it is now private; for the Letters-Patent refer to private Instructions, which are no where of Record, *Et de non apparentibus & non existentibus eadem est ratio*: besides, the danger to the Subject is great; for if they lose their Instructions (which hath and may happen) all is *Coram non Judice*. The second Reason is drawn from the contumacy of the Party, supposed to be grieved by the Prohibition, and against whom it is granted: for if the Authority of the Councel be never so good, yet being a late Jurisdiction, the Party must of necessity plead it, so as it may appear judicially; for as we are Judges of Record, so must we be informed of Record: And no party prohibited, ever yet moved in Court to have a consultation, by which might be set forth the Jurisdiction of that Court and Councel; so as the granting of Prohibitions hath been just. The third Reason is drawn from the great Injury offered to the Defendants, for it is a true Rule, *Misera servitus ubi jus est vagum aut incertum*. The Defendants by Law may in all Courts plead to the Jurisdiction of the Court: but how can they do so, when no man can possibly know what Jurisdiction they

have: And the keeping of them in such Secrecy bewrayeth that the Councel are afraid, that they would not be justified if they were known.

53. 3. That the manner of our Proceedings was respectful: for a Jury of Officers and Attorneys of our Court being according to an antient Custome, time out of mind used, sworn to present, among other things, all Defaults of Officers and Ministers, in not executing the Process of this Court, and all Impediments of the due Proceedings thereof: And finding upon their Oaths, divers unjust Impediments of the said Proceedings by the said Councel in particular, thereupon a motion being made in open Court in *Michaelmas* Term last, by the King's Serjeant *Philips*, of many Grievances done thereby, prayed the Court, according to Law and Justice, to grant several Prohibitions, in all those several Causes, which we could not deny. Yet first we conferred with Sir *Cuthbert Pepper*, Attorney of the Wards, and one of that Councel, to let him understand the particular Grievances; who, upon Motion, came to us to Sergeants Inne, with whom we conferred, who would not take upon him to justifie the same in no sort, but said he would acquaint the President and Councel therewith, and return their Answer. Which for that it was neglected, upon further Motion in Court, we granted Prohibition, as in Justice we ought.

4. Now to answer all Objections: And first, where it was objected, more Prohibitions had been granted of late, than in many years before: To this a Sixfold Answer was made.

1. That they had exceedingly multiplyed the number of Causes; they in five Counties, and three Towns, having at one sitting 450 Causes at Hearing: whereas the *Chancery* that extends into all *England* and *Wales*, had in *Easter* Term, but 95. and in *Trinity* Term but 72. to be heard. So that it is no wonder, if in such a Multiplication of Causes, the number of Prohibitions be increased.

2. Besides

2. Besides the Multiplication they have innovated and taken upon them, to deal in Causes which we know never any President could, and we think, never any President and Councel did usurp: As first, Suits upon Penal Laws; As between *Harrison* and *Thurston*, upon the 39 of *Eliz.* of Tillage. 3. In *Hartley's* Case, after Indictment of Forcible Entry, and Restitution according to the Statute upon *English* Bill, dispossessed by the President. 4. After a Recovery in *Ejectione Firmæ*, and *Habere facias Possessionem*, out of our Court, they upon *English* Bill dispossessed the Plaintiff; this was *Hart's* Case. So in other Cases; as between *Jackson* and *Philips*, *Stanton* and *Child*, and *Binns* and *Collet*. 5. They admit *English* Bills, in nature of *Writs of Errour & Formedons*, and other reall Actions. 6. They will admit no Plea of Outlary, in disability of the Plaintiff. 7. They usually granted Injunctions to stay the Common-Law, which is utterly against Law; and sometimes to stay Suits in *Chancery*, and in the *Exchequer Chamber*: for which, in respect as well of the Multiplications of Suits, as Innovations of others, it may very well be, that more Prohibitions, and *Habeas Corpus* have been granted of late, than in time past. And yet there hath been more granted, and more antient than is supposed: For which, see *Mich.* 7 *Eliz. Rot.* 31. and *Mich.* 7. and 8 *Eliz. in libro de* Habeas Corpus. Also, *Trin.* 20 *Eliz. ibid.* 54.

3. The Judges never grant either Prohibition, or *Habeas Corpus*, but upon Motion or Complaint by the Party grieved; and therefore as the Subject hath more cause to complain, there must needs be more Prohibitions, and *Habeas Corpus*, than heretofore.

4. The Proceedings there are by absolute Power, and their Decrees uncontrollable and finall, more than in a Judgment in a Writ of Right, which makes them presume too much upon their Authority.

5. These

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5. These Suits grow more prejudicial to the King than ever, because thereby the King loseth his Fines, &c.

55. 6. Remedy for the time past; if the Common-Bench erre, Writ of Errour lies in *Banco Regis*; if the Kings-Bench erre, a Writ of Errour lyes in the Upper-House of Parliament.

7. For the time to come: 1. That the Instructions be inrolled in *Chancery*, that the Subject may see and know their Jurisdiction. 2. That the Presidents and Councels, have some Councel Learned in the Court, to inform us judicially of their true Jurisdiction, and we will give them a day to shew cause, that Justice may be done on both sides; and if we erre, the Law hath provided a Remedy by Writ of Errour: And we are sworn to do Justice to all, according to the Laws.

Upon this Answer of the Judges, the Lords of the Councel, upon Conference among themselves, gave (by the Earl of *Salisbury*, then Lord Treasurer) this Resolution.

1. That the Instructions should be Recorded, as far as they concerned Criminal Causes, or Causes between Party and Party: But as to State-Matters, not to be published.

2. That both Councels should be within the Survey of *Westminster* Hall, *viz.* the Courts of *Westminster*.

3. The Motion was well allowed, that the Presidents and Councels should have Councel learned in every Court, that day might be given, &c.

And concerning the remoteneſſe of the place, the Counties of *Cornwall* and *Devon*, are more remote then *York*: And this was the end of that Dayes Work.

Case of Heresy.

56. Note, 2 *Ma.* title *Heresy*, *Brook*, *per omnes Justiciarios et*

Baker

aker et Hare. The Archbishop in his Province, in the Convocation, may and doth use to convict Heresy by the Common-Law, and then to put them convicted into Lay-hands, and then by the Writ *de Heretico comburendo*, they were burnt; but because it was troubleseme to call a Convocation, It was ordained by the Statute, 2 H. 4. *cap.* 15. That every Bishop in his Diocesse might convict Hereticks. And if the Sheriff was present, he might deliver such to be burnt without the Writ aforesaid; but if the Sheriff were absent, or he were to be burnt in another County, then the said Writ ought to be had: And that the Common-Law was such, *Vide lib. Intrs*, title *Indictment*, *pl.* 11. Who are Hereticks, See 11 H. 7. *Book of Entries*, *fol.* 319. See *Doct. & Stud. lib.* 2. *cap.* 29. *Cosin.* 48. 2. 1 & 2 P. & M. *cap.* 6. Also F. N. B. *fol.* 269. And the Writ in the Register proves this directly, 4 *Bracton l.* 3. *cap.* 9. *fol.* 123, 124. And true it is, That every Ordinary may convent any Heretick or Schismatick before him *pro salute animæ*, and may degrade him, and enjoyn him penance according to Ecclesiastical Law; but upon such Conviction, the Party shall not be burnt.

Nota, The makers of the Act of 1 *El.* were in doubt what shall be deemed Heresy or Schisme, &c. and therefore the Statute of 1 *Eliz.* provides, That nothing shall be deemed Heresy, but what had been so determined by one of the four general Councels, the Word of God, or Parliament. See *Fox in Ed.* 6. *and Britton*, 5 *Ed.* 1. *lib.* 1. *cap.* 17. and with this agrees the Statute, 2 *H.* 5. *cap.* 7. 23 H. 7. 9. 25 H. 8. *cap.* 14. or that the proceedings in the Commencement and end was altered by the Statute, 25 H. 8. then came the Statute 1 *Ed.* 6. *cap.* 12. and that repealed 5 *R.* 2. 2 H. 5. & 26 H. 8. and the 2 H. 4. and by general words all Statutes concerning matter of Religion, then the 1 & 2 P. & M. *c.* 6. revived the 2 H. 4. by which the 25 H. 8. lost its force, but

but by the Act 1 & 2 *P. & M. cap.* 8. expreſly repealing. 21 H. 8. 23 H. 8. 24 H. 8. 27 H. 8. but the 25 H. 8. *cap.* 14. was not repealed, being repealed before by the 1 *Ed.* 6. yet in the end of that long Act, there is a general Clauſe ſufficient of it ſelf to repeal the Act 25 H. 8. *cap.* 14. without more: then the 1 *Eliz. cap.* 1. repeals the 1 *and* 2 *P. and M.* is repealed, except ſome Branches; and in the ſame Act it is enacted, That all other Statutes repealed by the ſaid Act of Repeal, 1 *and* 2 *P. and M.* and not in this Act ſpecially revived, ſhall remain repealed. But the 25 H. 8. *cap.* 14. was not particularly revived, and therefore remains repealed. And after the ſaid Statute 1 *Eliz.* repeals the Act 1 *and* 2 *P. and M.* of reviving of three Acts for puniſhment of Hereſyes; ſo that now at Common-Law none can be burnt for Hereſy, but by Conviction at a Convocation.

Note, The High Commiſſion may puniſh Hereſies, and upon their Conviction, a Writ *de Heretico cumburendo*. See 6 *R.* 2. by which the Commons diſavowed their aſſent to the Act of the 5 *R.* 2. which was contrived by the Prelates in the Name of the Commons, whereas they never aſſented.

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58. Mich. 6 Jac. Regis, *Langdale's Caſe*.

In *Langdales* Caſe this Term, in a Prohibition to the High Commiſſioners, two Points were moved: 1. If a *Feme Covert* may ſue for Alimony before the High-Commiſſioners. 2. If the Court of Common Pleas may grant a Prohibition when there is no Plea pendant there: This concerning the Juriſdiction of the Court was firſt debated, and divers Objections were made againſt it.

1. That this Court hath not Juriſdiction to hold Plea, without an Original, unleſs by Priviledge of an Attorney,

ney, Officer, or Clerk of the Court, and unless it be in a special Case, *viz.* when there is an Action there depending for the same Cause; then it was agreed, that a Prohibition ought to recite, *Quod cum tale Placitum pendet, &c.* And it was said, That *F. N. B.* 43. *g.* agrees with this. But a man ought to have his Prohibition out of *Chancery*, or the *Kings Bench*, upon surmise that he is sued in *Court-Christian* for a Temporal Cause, and the 2 *Ed.* 4. 11. 6. was cited.

To this it was answered and *Resolved* by *Coke*, chief Justice, *Warberton*, *Daniell*, and *Foster*, Justices, That the Common Pleas may award a Prohibition, though no Suit be there pendent; for it is the principal Court of Common Law for Common Pleas, *Quia Communia Placita non sequantur Curiam nostram*, as it is Enacted by *Magna Charta*, thirty times confirmed by Parliament; then if the Ecclesiastical Judges incroach upon the Jurisdiction of the Common Pleas, there the Court shall Grant a Prohibition, and that without Original Writ, for divers Causes:

1. Because no Original Writ issuing out of Chancery is returnable into the Kings Bench or Common Pleas, but is directed to a Judge, or Party, or both, and is not returnable. And upon contempt of the Prohibition, the Chancellor may award an Attachment, returnable either in the Kings Bench, or Common Pleas, which in such case is but a Judicial Writ. And if such Attachment be returnable in the Common Pleas, &c. the Plaintiff in the Declaration shall make mention of an Original in Chancery, and of the contempt, &c. as appears in a notable President. 59.

2. There was great reason that no Originial Writ of Prohibition shall be returnable, for the Common-Law was a Prohibition in it self, and incroachment upon it incurred a contempt, and with this agrees our Books, 9 *H.* 6. 56. And there 'tis held, That the Statute of the 45 *Ed.* 3. and the Common Law also was a Prohibition

hibition in it self: and thus the Rule of the Book, 19 H. 6. 54. so is it held in 8 R. 2. Title *Attachment Sur Prohibition* 15.

Note, By *Clopton* a Sergeant, at the Common Pleas, That if a Plea be held in *Court-Christian*, which belongs to the Court of the King, without a Prohibition *in facto*, the Plaintiff shall have an Attachment upon a Prohibition; *Quod fuit concessum*, &c. *Register* 77. *Estrepement*, *Præcipimus quod inhibeas*, &c. F. N. B. 259. *Register* 112. A Consultation is as much an Original, as a Prohibition: And the Court hath granted a Consultation, *ergo* Prohibitions. *Qui habet jurisdictionem absolvendi, habet juris dictionem Ligandi.*

There are several sorts of Prohibitions; one sort with this word, *Prohibemus vobis*, and Letters in nature thereof, as *Supersedeas*. And Injunction is a Prohibition; and Prohibition of Waste out of *Chancery* &c.

Express Prohibition are in two manners; the one, founded upon a Suggestion; the other, upon Record: Upon Suggestion, where Plea is pendent, and yet the Suggestion is the Foundation; but it is founded upon Record, where no Plea is pendent; for Prohibitions founded upon Record, *Ne admittas*, ought to recite the Plea pendent. So a Writ to the Bishop, to admit a Clerk, is a Judicial *Latitat*, as *Dyer* defends it. As to the pendency of a Plea, or not pendency, it is not material for divers causes.

60. 1. The pendency of the Plea may give a priviledge to the party, but no Jurisdiction to the Court in a Collateral Suit; between which there is great diversity.

2. The Prohibition, where Plea is pendent, is no process Judicial upon Record, for it is a Collateral Suit.

3. If the Common-Pleas cannot grant a Prohibition, without a Plea pendent; then the Kings which onely holds Plea of Common Pleas by second means cannot. But inasmuch as the Common-Law is instead of an Original, as hath been said, both Courts may grant it.

4. In-

4. Infinite Presidents may be shewn of Prohibition out of the Common Pleas, without recital of any Plea pendent: And true it is, That it ought to be, if the Court hath not Jurisdiction to grant any without Plea-pendant; every petty-Clerk of the Common-Pleas shall have by his Privilege a Prohibition without Plea-pendent. *A fortiori*, the Common Law it self may prohibite any one, 4 *Ed.* 4. 37. 37 *H.* 8. 4.

5. A President is in the 22 *Ed.* 4. where a Prohibition was granted, for that the Plaintiff might have a Writ of false Judgment at the Common Law. The Record and Report agree, the words of the Record are:

6. That Officers and Clerks as well in the Common-Pleas as in the Exchequer, &c. may have by Privilege of Court a Prohibition without Original; a *fortiori*, the Law it self shall have greater Privilege than an Officer or Clerk, and to enforce the party to bring an Action, will be a means to multiply Suits to no end, 4 *Ed.* 4. *fol.* 37. every Prohibition is as well at the Kings Suit, as at the Parties, 28 *Ed.* 3. 97. false Latin shall not abate, nor excommunication in the Plaint is no Plea, 15 *Ed.* 3. Title *Corody* 4.

Note, Though the Original cause was in the Kings Bench, for Corody Excommunication is no Plea in disability of the Plaintiff: *Vide* 21 *H.* 7. 71. *Kelwey* 6. *quare non admissit*, 4 *Ed.* 4. 37. for not delivery of a Libel in the Common Pleas, he shall have a Prohibition by all the Justices. So upon 2 *Ed.* 6. *cap.* 13. See 38 *H.* 6. 14. 22. *Ed.* 4. 20. 13 *Ed.* 3. Title *Prohibition* 11. 61.

32 *H.* 6. 34. An Attorney in the Palace assaulted and menaced, the Court shall take a Bill and inquire of it, 4 *Ed.* 4. 36. 37. *Statham Prohibition* 3.

Prohibition super articulos, title *Prohibition*, *pl.* 5. gives a Prohibition before, *Scil. coram Justiciariis nostris apud Westm.* Vide *F. N. B. fol.* 69. *b.* in a Writ of *Pone*:

Register

Regiſter. indic. coram Juſticiariis noſt is apud Weſtm. is the Common Plea, *F. N. B. 64. d. 38 Ed. 3. 14. Statute 2 Ed. 6. cap. 13. Hales* Caſe in my Reports. Many Prohibitions were granted in the Kings Bench, becauſe no Writ of Error lyes but in Plaint.

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61. *Robert Bankes* Caſe, Mich. 6 Jac. *Regis.*

Mich. 6 Jac. Rot. 639. Robert Rankes Gent. brought an Action upon the Statute of *Winton* 13 *Ed. 1.* againſt the Inhabitants of the Hundred of *Burnham* in the County of *Bucks*, and counted that certain miſdoers, to the Plaintiff unknown, at *Hitcham* the 22d. of *Nov. 5 Jac.* aſſaulted the Plaintiff, and robbed him of 25 l. 3 s. 2 d. ob. and that he immediately after the robbery, the ſame 22d. of *Nov.* at *Joplow* and *Manlow*, the next Towns to *Hitcham* in the ſaid County, made *Hue-and-Cry*, *&c.* and after the ſaid Robbery, and within 20 dayes before the purchaſe of the Writ, *viz.* the 19 of *Febr. An. 5.* at *Dorney* in *Com. præd.* the Plaintiff before Sir *William Gerrard* Knight, then Juſtice of Peace in the ſaid County, and living next the ſaid Hundred, being examined upon Oath, according to the Statute 27 *Eliz.* the Plaintiff upon his Oath ſaid, He knew not the Parties who robbed him; and ſince the ſaid Robbery 40 dayes are paſt, and the ſaid Inhabitants of *Burnham* have not made him any amends, nor the Bodies of the Felons, or any of them, have taken, but ſuffered them to eſcape; to which the Defendants plead, *Not Guilty*, and *V. fa.* was awarded *de vicineto*, *&c.* And the Jury gave a ſpecial Verdict, and found that the Plaintiff was robbed, and made *Hue-and-Cry* as aforeſaid, and found over, That the Plaintiff was ſworn before Sir *William Gerrard* as aforeſaid, and ſaid upon his Oath in theſe Engliſh words, *viz.* *That he on Thurſday the 22d. of* Nov. 1604. *riding under* Hitcham *wood*, *&c.* *was then and there ſet upon by Horſemen, which he*

he knew not, and robbed of 25 *l.* 3 *s.* 2 *d. ob.* but whether the ſaid Oath ſo taken be true according to the ſaid Statute 27 *Eliz.* the Jurors pray the direction of the Court.

Mouſes *Caſe*, *Mich.* 6 *Jac. Regis.* 62.

In an Action of Treſpaſs brought by *Mouſe* for a Caſket, and 113 *l.* taken and carryed away; the Caſe was, The Ferryman of *Graveſend* took 47 Paſſengers into his Barge to paſs to *London*, and *Mouſe* was one of them; the Barge being upon the Water, a great Tempeſt happened, ſo that the Barge and all the Paſſengers were in danger to be drowned, if a Hogſhead of Wine and other ponderous things were not caſt out: And it was *Reſolved per totam Curiam*, That in a caſe of neceſſity for ſaving the Lives of the Paſſengers, it was lawful to the Defendant, being a Paſſenger, to caſt the Plaintiff's Casket out of the Barge with what was in it; for *quod quis ob tutelam corporis ſui fecerit, jure id feciſſe videtur.* Upon the ſpecial matter pleaded, and Reply, *De injuria ſua propria abſque tali cauſa*, the firſt day of this Term, the Iſſue being tryed, and it was proved directly, That the Men had been drowned, if the things had not been caſt out: The Plaintiff was Non-ſuit.

Reſolved alſo, That though when the Ferry-man ſurcharge the Barge, yet to ſave the Paſſengers Lives in ſuch a Neceſſity, it is lawful for the Paſſengers to caſt the things out of the Barge; yet the Owners ſhall have their Remedy upon the ſurchage againſt the Ferry-man; but if there was no ſurcharge, but the danger came by the Act of God, then every one muſt bear his own loſſe; for *Intereſt Reipub. quod homines conſerventur*, 8 *Ed.* 4. 23. *Bull. &c.* 12 *H.* 8. 15. 28 *H.* 8. *Dyer* 36.

63. Mich. 5 Jac. Regis. *Prohibitions del Roy.*

Note, On *Sunday* the 10. of *Nov.* in this Term, the King, upon Complaint made by *Bancroft*, Arch-Bishop of *Canterbury*, concerning *Prohibitions*, the King was informed, That when Question was made of what matters the Ecclesiastical Judges have Cognizance, &c. in any Case in which there is not express Authority in Law, the King himself may decide in his Royal Person, the Judges being but his Delegates, &c. And the Arch-Bishop said this was clear in Divinity. To which it was answered by *Mee*, in the presence, and with the clear Consent of all the Justices of *England*, and Barons of the *Exchequer*, that the King in his own person cannot adjudge any Case either Criminal, as Treason, &c. or betwixt party and party, concerning Inheritance, Goods, &c. But it ought to be determined in some Court of Justice, according to the Law and Customs of *England*, and all Judgments are given *Ideo consideratum est per Curiam*. And the King hath his Court in the Upper House of Parliament, in which he with his Lords is the Supream Judge over all Judges. And in this respect, the King is called Chief Justice, 20 *H.* 7. 7. *a.* by *Prudsel*; and it appears in our Bookes, 2 *R.* 3. 9. 21 H. 7. 8. that that the King may sit in the *Star-chamber*; but this was only to consult, not *in judicio*. So in the *Kings-Bench*; but the Court gives Judgment. And 'tis commonly said in our Books, the King is alwayes present in Court; and therefore he cannot be Non-suit: And it appears by the Acts of Parliament, 2 *Ed.* 3. c. 9. 2 *Ed.* 3. c. 1. That neither by the Great Seal, nor by the little Seal, Justice shall be delayed. *Ergo*, The King cannot take any Cause out of any of his Courts, and give Judgment upon it; but in his own Cause he may stay it, as appears 11 H. 4. 8. And the Judges informed the King, that no King after the

the Conqueſt, ever aſſumed to himſelf, to give Judgment in any Cauſe whatſoever, which concerned the Adminiſtration of Juſtice within the Realm, 17 *H.* 6. 14. 39 *Ed.* 3. 14. the King cannot Arreſt any man, 1 *H.* 7. 4. *Huſſey*, chief Juſtice, Reports, being Attorney to *Ed.* 4. That Sir *John Markham*, chief Juſtice, ſaid to *Ed.* 4. That the King cannot Arreſt a man for ſuſpition of Treaſon or Felony, as his other *Leiges* may. And it was greatly marvailed, That the Archbiſhop durſt inform the King that ſuch abſolute Power as aforeſaid belonged to him by the Word of God. Vide 4 *H.* 4. *cap.* 23. *Weſtm.* 2. *cap.* 5. vide *le ſtat. de Marlbridge, cap.* 1. & *ſtat. de Magn. Chart. cap.* 29. 25 *Ed.* 3. *ſt.* 5. *c.* 4. 42 *Ed.* 3. *c.* 3. 28 *Ed.* 3. *c.* 3. 37 *Ed.* 3. *c.* 18. vide 17 *R.* 2. *ex Rotulis Parliamenti in Turri act.* 10. A controverſy of Land between Parties was heard by the King, and Sentence given, which was repealed, becauſe it did belong to the Common Law. Then the King ſaid, *That the Law was grounded upon Reaſon, and that He and Others had reaſon as well as the Judges.* To which it was anſwered by *Me, That true it was, God had endued his Majeſty with excellent Science, but his Majeſty was not learned in the Laws of* England, *and Cauſes which concern the Life or Inheritance, or Goods of his Subjects, which are not to be decided by natural Reaſon, but artificial Reaſon and Judgment of Law, which Judgment requires long Study and Experience.* With which his Majeſty was greatly Offended, and ſaid, *Then he ſhould be under the Law, which was Treaſon to be ſaid*; To which I ſaid, that *Bracton* ſaith, *Quod Rex non debet eſſe ſub homine, ſed ſub Deo et Lege.*

Mich. 8 Jacob. Regis. *Robert's Caſe.* 65.

In this Term, in the Caſe of one *Roberts*, a Prohibition had been granted in a Caſe upon Subſtraction of

Tythes, upon surmise that the Plaintiff being Defendant in the Spiritual Court, had but one Witness there to prove his Demise: to which the Court said, That *singularis Testis* is not allowable: And upon sight of a Prohibition in the same Case in *Hill. 3 Eliz. in Banco Regis*. It was Resolved by *Coke*, chief Justice, *Et totam Curiam in Communi Banco*, that Consultation should be granted for divers Reasons.

1. It appears by the *Register*, *fol.* 5. that it is put for a Rule, *Quod non est consonum rationi, quod cognitio accessorii in Curia Christianitatis impediatur, ubi cognitio causæ principalis ad forum Ecclesiasticum noscitur pertinere*; and with this agrees 1 *R.* 3. 4.

2. If such a surmise shall be allowed, then in every Case, for meer delay, such a surmise may be made. And when the spiritual Court hath Jurisdiction of the principal Cause, they determine the accessory: But it was objected, That if *A.* claiming a Lease by *B.* of a Rectory, Libels for substraction of Tythes, and the Defendant pleads a former Lease made by *B.* and *C.* and the Defendant hath but one Witness in the Case to prove the former Lease; if no Prohibition shall be granted, the Defendant shall be charged. And if *C.* sue him upon the Statute 2 *Ed.* 6. the testimony of one only shall be then sufficient, and so he shall be twice charged.

To which it was answered, That first the fault was the Defendants, that he would not set forth his Tythes, and then he shall be charged whosoever takes them. But in such the Ecclesiastical Court will upon one good Witness, and any concurrent vehement presumption, allow of such a proof. But if a question arise upon construction of a Statute, and the Ecclesiastical Court will Judge of it against the Rule of Law, there upon special surmise of it, a Prohibition lies.

And *Coke*, chief Justice, cited a notable Judgment, *Pasch. 35 Eliz. in Banke le Roy*. *Fuller* brought a Prohibition against *Clements*, and *Wiskard*; and *Fuller* counted

counted that himself was Owner of the Rectory of *Longham* in the County of *Norfolk*, and libelled against *Clements* before the Bishop of *Norwiches* Official, for subſtraction of Tythes *ſcil.* Wheat pendent (which Suit *Wiſkard* intervening *pro interceſſe ſuo*, made there allegations against *Fuller*:

1. That the ſaid Rectory was impropriate to the Monaſtery of *Windling*, and by diſſolution thereof, came to *H.* 8. and conveyed it by mean Diſcent to Queen *Elizab.* who by Letters Patents granted it to *Mia* and *Hall*, who enfeoffed *Bozome*, who let it to *Wiskard* for four years; and upon proof of his allegations; in fine, Sentence was given againſt *Fuller*, and ſeveral Coſts given to *Clements* and *Wiskard*: *Fuller* appeals to the Court of the Arches, and there Claims the ſaid Rectory from *Halls* being ſeized of it, who by his Deed granted the ſame to Sir *Edward Clere*, (before *Bozomes* Feoffment,) and that Sir *Edward* did enfeoff *Fuller*, and offered to prove the Deed made to Sir *Edward* by one ſole Witneſs, which the Eccleſiaſtical Court would not allow of. And *Fuller* further ſaid, That though he had alledged theſe matters were determinable at Common Law, yet they gave Sentence: The Defendants to have a Conſultation pleaded, That *Fuller* proved the delivery of the Deed by *Clere* and *Mouſe*, but could not prove *Livery and Seiſin* according to the Deed; and that therefore Sentence was given without that, that the Judges would not admit the proof without other Witneſſes; upon this *Fuller* demurred, and his Council objected. 66.

1. That *Wiskard* pleads matter determinable meerly at Common Law, *viz.* Letters Patents, &c. and on the other part *Fuller* Claims an Eſtate in the Rectory, by conveyance at Common Law: And the Queſtion in the Court Eccleſiaſtical being? Who hath the beſt Eſtate in the Rectory; this ought to be tryed by the Common Law, for this is the Birth-right of the Subject.

2. It was Objected, That all matters in Law ought to be determined by the Judges of the Law: And in this Case matters of Law arising, as if a Rectory be granted by Deed with all Tythes, &c. and no Livery is made. If the Tythes may pass with any Livery; this is a question to be decided by the Judges of the Common Law: *Quod quisque novit in hoc se exerceat.*

3. It was objected, That *Wiskard* was a meer stranger to the Suit, and all his Allegation is Temporal; and for that it is a stronger Case to maintain a Prohibition.

4. It was Objected, That *Fuller* had but one Witness to prove the delivery of the Deed, and in the Ecclesiasticall Law *Unus Testis* & *nullus Testis*, for which causes it was prayed the Prohibition might stand.

67. To which it was answered by Sir *Christopher Wray*, chief Justice, *Et per totam Curiam*, to the first Objection, That;

1. Where the original belongs to the Ecclesiastical Court, the determination of all that depends on it belongs to the same Court, though the matter be tryable at Law; but where the Original matter belongs to the Common Law, and there commenced, and issue taken upon matter tryable by the Ecclesiastical Law, there the Judges of our Law shall write to the Judges of the Ecclesiastical Court to try it, and to certify. As in action Ancestral, if Bastardy be pleaded in the Demandant, and upon this Issue is joyned, this shall be tryed by the Bishop, and his Certificate shall bind; So in a *Quare Impedit*: But though such issues are in their nature Tryable by the Law Ecclesiastical, yet if the Case was such, that the Ecclesiastical Court could not try it, then (that Justice be not wanting) such Ecclesiastical matter shall be tryed by the Common Law, as 4 Ed. 3. 26. But against this was objected the Statute *de Articulis Cleri*, cap. 13. *Quod de Idoneitate personæ præsentatæ ad beneficium Ecclesiasticum pertineat examinatio ad Judicem Ecclesiasticum*

ſiaſticum; upon which it was concluded, That the Tryall *de idoneitate perſonæ* in all Caſes belong to Court-Chriſtian: To which it was anſwered and reſolved, That the Tryal of ability belongs to them; but this Tryal muſt be by examination of the Party. See 39 *Ed.* 3. 2, The Earl of *Arund ll*'s Caſe, and 4 *Ed.* 3. 25, 16 *Eliz. Dyer* 327. So if Baſtardy be alledged in one who is dead, *Vide* 17 *Ed.* 3 5. where Baſtardy is alledged in the Tenant, and one who is a ſtranger to the Writ, who are Siſters. *Vide* 32 *Ed.* 3. *Trial* 59. where the Tenant doth alledge Baſtardy in himſelf, and the Demandant doth aver him *Mulier*, *Vide* 29 *Aſſ. pl.* 14 & *Eliz. Dyer* 226. 228. If the iſſue be *Quod vicavit per reſignationem*, part of which is Spiritual, part Temporal; this ſhall be tryed *per patis*, vide 9 *H.* 7. But admiſſion and inſtitution, though it be alledged in a ſtranger to the Writ, yet this ſhall be tryed by the Ordinary, as appears 7 *Ed.* 6. 78. 6. in *Dyer & ſimilia*.

2. To the ſecond; anſwered and reſolved, That if upon Conſultation with men learned in the Law, they give Sentence according to Law; this is well done, and no Prohibition ought to granted: but if they draw the intereſt of any man *ad aliud examen*, there Prohibition lyes. And in the Caſe at the Barr, they well reſolved the Law; for by the ſaid Livery of the Charter, the Tythes do not paſs as in groſs, becauſe the intention of Parties was to paſs the entire Rectory by the Feoffment, and to paſs the Tythes, and ſo diſmember the Rectory. 68.

3. As to the third, *Reſolved*, That by the Eccleſiaſtical Law a ſtranger may come in *pro intereſſe ſuo*, and when they have Juriſdiction of the Original cauſe of a Suite, we ought not to queſtion their proceeding, unleſs they proceed *inverſo ordine*, and this ought to be redreſſed by appeal.

4. As to the fourth, *Reſolved*, That ſuch a ſurmiſe, That he hath but one Witneſs, is not ſufficient to have a

Prohibition, because the Court Ecclesiastical hath jurisdiction of the Principle. And if such surmise shall be sufficient, all Suits in the Ecclesiastical Court shall be delayed, or quite taken away, for such surmise may be made in every Case.

It was *R solved* upon Evidence, by *Coke*, chief Justice, *de Banco, inter J. S.* who informed upon the Statute of Usury and *Smith*, that the Parties to the supposed Usurious Contract, shall not be admitted Witnesses, because upon the matter they were *Testes in propria causa.*

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69. *High-Commissioners.* Trin. 8 Jacobi Regis.

Upon a *Ha. Cor.* by *Elix.* Lady *Throgmorton* Prisoner in the *Fleet*; the Return was, The Lady *Throgmorton* was committed by *George*, Bishop of *London*, and other Ecclesiastical Commissioners, till further Order should be taken for her enlargement. And the Cause of Commitment was, That she had done many evil Offices between Sir *James Scudamore*, and her Daughter the Lady *Scudamore*, Sir *James* his Wife, to make separation between them, and detained her from her Husband; and upon her Departure after Sentence, for Contemptuous words against the Court, saying, *She had neither Law nor Justice.* And it was *Resolved*,

1. That for detaining the Wife, and endeavouring to make separation, no Suit can be before the High-Commissioners.

2. For detaining the Wife, there is remedy by the Common Law.

3. That for such an Offence they cannot imprison the Wife.

4. It doth not appear, that the words were spoken in Court.

Secondly, It is no Court of Record, because they proceed according to the Civil Law; so the Admiralty Courts and

and none can be committed for misdemeanor in Court, unless the Court be of Record.

5. It doth not appear by the Return what that Court was, which is uncertain; and upon this, upon good Consideration, she was Bayled.

But *Randall* and *Hickins* were this Term committed by the High-Commissioners, because they were vehemently suspected for *Brownists*. And they obtained a *Habeas Corpus*, and were remanded for this, that the High-Commissioners have Power to commit for Heresy. See my Treatise of the High-Commissioners Power.

The Lord Aburgavennye's *Case*.

69.

In the Parliament a Question was moved by the Lord of *Northampton*, Lord Privy-Seal, in the Upper-House; That one *Edward Nevill*, Father of *Edward Nevill*, Lord of *Aburgavenny*, which now is, in the 2 and 3 of Queen *Mary*, was called by Writ to Parliament, and died before the Parliament: If he was a Baron or no, and so ought to be named, was the Question. And it was

Resolved by the Lord Chancellor, the two chief Justices, chief Baron, and divers other Justices there present, That the direction and delivery of the Writ did not make a Baron or Noble, untill he did come to the Parliament, and then sit according to the Commandment of the Writ; for untill that, the Writ did not take its effect. And in the 35 H. 6. and other Books, he is called a Peer of Parliament, which he cannot be, untill he sit in Parliament, which cannot be before the Parliament begin. And the Command of the King by such his Writ may by his *Supersedeas* be countermanded, or else the said *Edward* might have excused himself, or waved it, or submitted to his Fines: And when one is called by Writ to Parliament, the Order is, That he be apparelled in his Parliament Robes, and his Writ is openly

openly read in the Upper-House, and he brought into his place by Two Lords of Parliament; and then he is adjudged in Law, *Inter pares Regni, ut cum olim Senatores certis religabantur, sic Barones apud nos habiti fuerint, qui per integram Baroniam terras suas tenebant, sive 13. feoda militum et tertiam partem unius Feodi militis, quolibet Feodo computato ad 20 l. &c.* So that by this appears, That every one who hath an entire Barony, may have of right a Writ to be summoned to Parliament; and with this agree our Books *una voce*, That none can sit in Parliament as Peer of the Realm, without matter of Record, 35 H. 6. 46. 48 Ed. 3. 30. b. 48 Ass. pl. 6. 22 Ass. pl 24. Register. 287. but now none can be summoned to Parliament by Writ, without the Kings Warrant under the Privy-Seal at least. But if the King create any Baron by Letters Patents under the Great-Seal to him and his Heirs, or to him and to his Heirs of his Body, or for life, &c. there he is a Nobleman presently, and he ought to have a Writ of Summons to Parliament of Course, and shall be tryed by his Peers, if, &c.

Richard the Second created *John Beauchampe* of *Holt*, Baron of *Kidderminster* by Letters Patents, dated 10. *Octob.* eleventh year of his Reign, where all others before him were created by Writ.

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71. Trin. 8 Jac. Regis. *Oldfield* and *Gerlins* Case.

In this Term *Thomas Oldfield* came out of the Duchy Court, and before he came into *Westminster-Hall*, with a Knife, stabbed one *Ferrars*, a Justice of Peace, of which he dyed. And if *Oldfield* should have his right hand cut off, was the question before the two Chief Justices, chief Baron *Walmesly*, *Warberton*, *Foster*, and divers other Justices. And it was Resolved, No; for it ought to be in *Westminster-Hall*, *Sedentibus Curiis*, as appears, 3 *Eliz. Dyer* 188. 41 *Ed.* 3. *Title Cores.* 280. And a President was shewn,

As

An. 9 Eliz. in Banke le Roy, where one *Robert Gerlin* smote one in *White-hall*, sitting in the Court of Requests, and was Fined, and Ransomed. But if one smite another before the Justices of Assize, there his right hand shall be cut off; as appears, 22 *Ed.* 3. *fol.* 13. & 19 *Ed.* 3. *Title Judgment*. And one *Bellingham*, 2 *Jac.* in *Westminster-Hall*, *Sedentibus Curiis*, with his Elbow and Shoulder, out of malice justled *Anthony Dyer* of the Temple, that he overthrew him, and spurned him with his Feet upon the Legs; but smote him not in any other manner: And yet it was held, That his right hand should be cut off, &c. upon which *Bellingham* was indicted in *Banke le Roy*, and after got his Pardon.

A Case was put to all the Justices of *England*, *viz.* 71.
The Bishopricks of *Waterford* and *Lismore*, originally two Bishopricks, by lawful Authority, in the time of *H.* 3. were united, but the Chapters yet remain several. After which Union, the Bishop aliened Lands of the Sea of *Waterford*, and also of the Sea of *Lismore*, with confirmation of the Chapter of *Lismore*.

1. The Question was, Whether such Alienations are not voydable by the Successor, being with the Confirmations of both the Deans and Chapters.

2. The second Question was, Whether the Queen might avoid such alienations by seizure, or otherwise.

The Justices demanded a View of the Union, to which it was answered, That it was not extant; then was it *Resolved* by the Justices, That inasmuch as the Usage hath been after the Union, that the several Deans and Chapters have severally made Confirmations *ut supra*; it shall be intended, that the Union notwithstanding, yet for avoiding Confusion, and in respect of the remoteness of the Deans and Chapters, that Estates made shall be severally confirmed as before the Union, and then such Confirmations shall be good, for in such Case, *Modus & conventio vincunt Legem*, 50 *Ed.* 3. *Title Assize. Statham. Ri.* 2. *Title Grant*, 27 H. 8. *Dyer* 58. 11 *Eliz. Dyer*, 38 H. 8. *cap.* 30.

2. It

2. It was *Resolved*, That upon a lawful Alienation made, with Confirmation of the Dean and Chapter, no *contra formam Collationis* lyes upon the Statute of *Westm.* 2. See my 7th. Reports.

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72. Trin. 8 Jacobi Regis. *Convocation Case.*

It was *Resolved* by the two Chief Justices, and divers other Justices, at a Committee before the Lords of Parliament, concerning the Authority of a Convocation.

1. That a Convocation cannot assemble, without the assent of the King.

2. That after their Assembly, they cannot confer to Constitute any Cannons, without Licence *d. l Roy.*

3. When upon Conference they conclude any Cannons, yet they cannot execute any of them without Royal assent.

4. They cannot execute any after Royal assent, but with these Limitations.

1. That they be not against the Kings Prerogative.

2. Nor against the Common Law.

3. Nor against Statute Law.

4. Nor against any Custom of the Realm: And all this appears by 25 *H.* 8. *cap.* 19. 19 *Ed.* 3. Title *Quare non admisit* 7. 10 *H.* 7. 17. *Merton, cap.* 9.

20 *H.* 6. 13. A Convocation may make Constitutions to bind the Spiritualty, because they all in person, or by representation, are present, but not the Temporality.

21 *Ed.* 4. 47. The Convocation is Spiritual, and so are all their Constitutions: *Vide* the Records in *Turri*, 18 *H.* 8. 8 *Ed.* 1. 25 *Ed.* 1. 11 *Ed.* 2. 15 *Ed.* 2. *Prohibitio Regis ne Clerus in Congregatione sua, &c. attemptet contra jus seu Coronam, &c.* by which it appears, they can do nothing against the Law of the Land, or the Kings Prerogative.

Case

Case of Piracy, Trin. 8 Jacob. Regis. 73.

In this Term the King referred the Conſideration of Letters Patents of the Lord Admiral of *England*, to the two Chief Juſtices, and the Chief Baron: whether by the ſaid Letters Patents the Goods which Pirates ſhould take from Others by Robbery and Piracy, did paſs to the Lord Admiral or no. And upon Conſideration thereof, it appeared to us, That he had *Bona et Catalla Piratorum*, and alſo *Bona et Catalla deprædata*; Goods robbed from others, which did not paſs for two Cauſes.

1. If the King Grant *Bona et Catalla Felonum*, the Patentee ſhall have the Goods and Chattels of the Felon himſelf, but not the Goods and Chattels which the Felon ſtealeth from others.

2. The Goods taken from Others, the King cannot Grant; for it appears by the Statute, 27 *Ed.* 3. *cap.* 8. *St.* 2. That the Merchant &c. ſo robbed ſhall be received to prove that the Goods and Chattels belong to him by his Cocket, or other lawful Proof, &c. the ſaid Goods ſhall be delivered without any Suit at Common Law. But it was *Reſolved*, That till ſuch proof be made, the King may ſeize the Goods; for Goods, of which the property is unknown, the King may ſeize: And if they are *bona peritura*, the King may ſell them, and upon proof, &c. reſtore the value. And the Owner is not limited to any time by the Statute 31 *H.* 6. *cap.* 4. 2 *R.* 2. *cap.* 2. 13 *Ed.* 4. 9, 10. a good reſolution of the Juſtices, and the *Regiſter* 129. F. N. B. 114. when a Subject of the King ſpoiled beyond Sea ſhall have a Writ, &c. for to take Goods within *England*, &c.

Caſe

73. *Case of Simony.* Trin. 8 Jacob. Regis.

It was agreed *ad menſam*, by all the Juſtices and Barons in *Fleet-ſtreet*, That if the Patron for any Money preſent any Parſon to a Benefice with Cure, &c. then every ſuch Preſentation &c. thereupon are void, though the Preſentee be not party nor privy to it; for the Statute 31 Eliz. c. 6. intends to puniſh ſuch wicked avarice, and gives the Preſentation to the Queen: And this *per verba Statuti* penned ſtrongly enough againſt corrupt Patrons.

74. *Proclamations.* Mich. 8 Jacobi Regis.

On *Thurſday* the 20th. of *Sept.* 8 *Regis Jacobi*, I was ſent for to attend the Lord Chancellor, the Lord Treaſurer, Lord Privy-Seal, and Chancellor of the Dutchy; the Attorney, Sollicitor, and Recorder being preſent. And two Queſtions were moved to me by the Lord Treaſurer;

1. If the King by his Proclamation may prohibite new Buildings in and about *London*?

2. If the King may prohibite the making of Starch of Wheat?

The Treaſurer ſaid, Theſe were preferred to the King as Grievances, and againſt the Law and Juſtice; To which the King Anſwered, That he will conferr with his Privy-Council and Judges, and then he will do them right. To which I anſwered, That theſe Queſtions being of great Importance, I did deſire, that I might have Conference with my Brethren the Judges; To which the Chancellor ſaid, Every Preſident had firſt a Commencement, and that he would adviſe the Judges to maintain the Kings Prerogative, and where there was no Preſident, to leave it to the King; and all concluded it

ſhould

should be necessary to confirm the Kings Prerogative with our Opinions.

To which I answered, True it is, every President hath a Commencement, but when Authority and President is wanting, there needs great Considerations before any Novelty be established; For I said, The King cannot change any part of the Common-Law, nor create any offence by his Proclamation: But I desired to Confer with my Brethren, for *Deliberandum est diu quod Statuendum est semel*; To which Mr. *Sollicitor* said, Divers Sentences were given in the *Star-Chamber* upon the Proclamation against Building, and that I had given Sentence against the said Proclamation: To which I answered, That Presidents were to be seen, and Considerations to be had upon Conference with my Brethren, for *Melius est recurrere quam male currere*, and Indictments conclude, *contra leges & statuta*, never *contra regiam Proclamationem*. At last my motion was allowed, and the Lords appointed the two Chief Justices, Chief Baron, and Baron *Altham* to consider of it.

Note, the King by his Proclamation, or otherwise, cannot change any part of the Common-Law, Statute-Law, or Customs of the Realm, 11 *H.* 4. 37. *Fortescue in laudibus Legum Ang. cap.* 9. 18 *Ed.* 4 35, 36, *&c.* 31 *H.* 8. *cap.* 8. *ubi non est lex, ubi non est transgressio*; *ergo*, That which cannot be punished without Proclamation, cannot be punished with it. *Vide le Stat.* 31 *H.* 8. *cap.* 8. But if a man be indicted upon a Contempt against a Proclamation, he shall be Fined and imprisoned. *Vide Fortescue, cap* 9 18 34 36, 37, *&c.* 75.

In all Cases, the King out of his Providence, and to prevent dangers, may prohibite them before, which will aggravate the Offence, if it be afterwards committed: And as it is a Grand Prerogative of the King to make Proclamations, 22 *H.* 8. *Procl.* B. yet we find Presidents of Proclamations utterly against Law and Reason, and therefore void: For *Quæ contra rationem Juris introducta*

traducta sunt, non debent trahi in sequentiam. An Act made to License Forreiners to Merchandize in *London*, *H.* 4. by Proclamation prohibited the Execution of it, *usque ad prox. Parliament.* which was against Law. *Vide dors. claus.* 8 *H.* 4. *Proc. in London*; but 9 *H.* 4. An Act was made, That all *Irish* should depart the Realm before the Feast of the Nativity; this only was *in terrorem*, being utterly against Law.

Hollingshead, 772. *Anno Dom.* 1546. 37 *H.* 8. The Whore-houses, *vulgo* Stews, were suppressed by Proclamation, and sound of Trumpet.

In the same Term *Resolved* by the two Chief Justices, Chief Baron, and Baron *Altham*, upon Conference between the Lords of the Privy-Council and them, That the King by his Proclamation cannot create any Offence, which was not an Offence before, for then he may alter the Law. And the Law of *England* is divided into three parts: 1. Common-Law. 2. Statute-Law. 3. Custom: But the Kings Proclamation is none of them.

Resolved also, That he hath no Prerogative, but what the Law of the Land allows him; but he may by Proclamation admonish his Subjects, that they keep the Laws, upon pain to be inflicted by Law, &c.

Lastly, If the Offence be not punishable in the *Star-Chamber*, Prohibition by Proclamation cannot make it punishable there. And after this Resolution, no Proclamation imposing Fine and Imprisonment was made, &c.

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76. Mich. 8 Jac. Regis. *Prohibitions.*

It was Resolved in this Term, That if a man be excommunicated by the Ordinary, where he ought not, as after a general Pardon, &c. and the Defendant being Negligent, doth not sue a Prohibition, but remains excommunicate

excommunicate by 40 dayes, and upon Certificate in Canc. is taken by the Kings Writ *de excommunicato capiendo*; no Prohibition lies in this Case, because he is taken by the Kings Writ. Then it was moved what remedy the Party hath, who is wrongfully excommunicate; to which it was answered, he hath three Remedies.

1. He may have a Writ out of Chancery to absolve him, 14 *H.* 4. *fol.* 24. and with this agrees 7 *Ed.* 4. 14.

2. When he is excommunicate against the Law of this Realm, so that he cannot have a Writ *de Cautione admittenda*, then he ought *Parere mandatis Ecclesiæ in forma Juris*, i.e. *Ecclesiastici*, where in truth it's *Excommunicatio contra jus & formam Juris*, i.e. *Communis Juris*: But if he shew his Cause to the Bishop, and Request him to assoyl him, either because he was excommunicate after the Offence pardoned, or that the Cause did not appear in Ecclesiastical Cognizance, and he refuse, he may have an Action *Sur le Case* against the Ordinary; and with this agrees *Dr. & St. lib.* 2. *cap.* 32. *fol.* 119.

3. If the Party be excommunicate for non e of the Causes mentioned in the Act, 5 *Eliz. cap.* 23. then he may plead this in the Kings Bench, and so avoid the Penalties in the Act.

Note, It was *Resolved* by the Court, &c. That where one is cited before the Dean of the Articles in cause of defamation, for calling the Plaintiff *Whore*, out of the Diocess of *London*, against the Statute of 23 *H.* 8. And the Plaintiff hath Sentence, and the Defendant is excommunicated, and so continues 80 dayes; And upon Certificate into the *Chancery*, a Writ of *Excommunicato capiendo* is granted, and the Defendant taken and imprisoned thereby, that he shall not have a Prohibition upon the Statute 23 *H.* 8. for no Writ in the Register extends to it; but there is a Writ there called *de cautione admittenda*, when the Defendant is taken by the Kings

Writ *de excommunicato capiendo de parendo mandatis Ecclesiæ*, and to assoyl and deliver the Defendant. But in the Case at Bar, it does not appear to us judicially, without Information, that the Citation is against the forme of the Statute: And the Information comes too late in this Case, after the Defendant hath persisted so long in his Contumacy, and is taken by the Kings Writ, and imprisoned.

77. *Admiralty.*

It was Resolved *per totam Curiam*, That if One be sued in the Admiralty-Court, for a thing alledged to be done upon the High-Sea, within the Admirals Jurisdiction, and the Defendant plead and confess the thing done; and after Sentence, the Court will be advised to Grant a Prohibition, upon surmise, That it was done *infra corpus comitatus*, against their own confession, unless it can be made appear to the Court by matter in Writing, or other good matter, that this was done upon the Land; for otherwise every one will stay till after Sentence, and then for vexation only sue out a Prohibition. And admonition was given to them that sue out Prohibitions, That they should not keep them long in their Hands, or untill they perceive they cannot prevail in the Ecclesiastical Court, then to cast in their Prohibition; for if they abuse that liberty to the vexation of the Party, we will take such order, as in case of a Writ of Privilege, if the Defendant keep it till the Jurors are ready, &c. it shall not be allowed.

78. *Hill. 8 Jacob. Regis.*

In this Term, in Doctor *Trevor's* Case, who was Chancellor of a Bishop in *Wales*; It was *Resolved*,

That

That the Office of a Chancellor and Regiſter, &c. in Eccleſiaſtical Courts, are within the Statute 5 *Ed. 6. cap.* 16. which Act, being made for avoiding corruption of Officers, &c. and advancement of worthy Perſons, ſhall be expounded moſt beneficially to ſuppreſs Corruption. And becauſe the Law allows Eccleſiaſtical Courts to proceed in Blaſphemy, Hereſy, Schiſme, &c. loyalty of Matrimonies, probate of Wills, &c. and that from theſe proceedings depends not only the Salvation of Souls, but the legitimation of Iſſues, &c. and other things of great Conſequence. It is moſt reaſon that ſuch Officers ſhall be within the Statute, then Officers which concern Temporal matters, the Temporal Judge committing the Convict only to the Gaoler, but the Spiritual Judge, by excommunication, to the Devil: And there is a Proviſo in the Statute for them.

It was Reſolved, That ſuch Offices were within the *Purview* of the ſaid Statute.

Hill. 8 Jac. Regis. *Admiralty.* 79.

It is to be underſtood, That the Juriſdiction of the Admiralty is more antient than Mr. *Lambert*, in his Juriſdiction of Courts, doth affirm, which was the time of *Edward* the Third. But without queſtion, the Juriſdiction of the Admiralty is more antient; for I find a notable Book in the time of *Ed.* 1. Title *Averry*, 192. which proves it more antient than Mr. *Lambert* ſpeaks: The Caſe was, *One brought a Replevin of his Ship taken on the Coaſt of* Scarbrough *upon the Sea, and carryed into* Norfolk, *and there detained; the plaint of taking in the Coaſt of* S. *which is no Town nor Place certain by which the* Pais *may be taken, for the Coaſt contains four Leagues.* And alſo a thing done at Sea, this Court cannot have Cognizance; for this Judgment is given to Mariners. *Bereſford*, who gave the Rule in this Caſe; The King Wills,

That the Peace be kept as well upon the Sea as the Land. And we find, that you come by due Proceſs, and we ſee nothing why you ought not to anſwer; upon which Book I obſerve five things:

1. That of things done upon the Sea, Judgment is given to Mariners, *id eſt*, to Admirals, as ſhall appear, and belongeth not to the King's Court, becauſe no *Paiis* may be taken there; for where the *Paiis* or Jury may come, the Admiral hath no Juriſdiction.

2. This proves directly, That there the Admiral hath Juriſdiction to adjudge things done upon the Sea, from whence no *Paiis* may come. And this did not begin then, for queſtionleſs ever ſince there was Trade or Traffick (which is the Life of every Iſland) there was Marine Juriſdiction, to redreſſe Depredations, Piracies, Murthers, and other Offences upon the Sea.

3. The third thing is, That if part of the matter be done on the Sea, and part in the Country, that the Common-Law ſhall have all the Juriſdiction.

4. The Sea within the Juriſdiction of the Admiral, is deſcribed to be out of every County.

5. If a thing be done upon the Sea, *hors del County*, the Party may plead it to the Juriſdiction of the Court.

80. And it is to wit, that in antient time the Juriſdiction of Admiral was called *Maritima Angliæ*, and ſometimes *Marina Angliæ*, which ſignifies the Admiralſhip or Marinſhip of *England*; for *Marinus* is the ſame with θαλάσσιος, that is of the Sea, and θαλασσίαρχος is the Admiral or General of the Fleet; and *Almarath* is corruptly *Admirall*. And antiently, ſometimes one was Admiral of all *England*, and ſometime the Office was divided. And for this, ſee *ex Rot. Patentium de An.* 6 *H.* 3. *de Maritima Cuſtodiend.* 29 *Aug. ex Rot. Pat. An.* 9 *H.* 3. 3. *Octob. Charta* 15 *H.* 3. 28 *Junii*, 25 *Ed. in* 14. *Clauſ. in Dorſo in* 18. *William Leyborne Capitaneus Marinariorum.*

At

At this time there were two Admirals, the one had the Government of all the Fleet from the *Thames* mouth *versus Boream*, the other from the *Thames* mouth *versus occidentem*, 1 *Pars. Pat nt.* 25 *Ed.* 1. 25 *Martii in* 9. & 1 *Pars. Patent.* 10 *Ed.* 2. 8. *Decem.* And so in the time of *R.* 2. *H.* 4. *H.* 5. *H.* 6. during whose Reigns there was like *unus qui fuit Admirallus Angliæ.*

3 *Ed.* 2. *Coron* 399. where a man may see what is done of one part, and the other of the Water, &c. in that place the County may have Cognizance, and it may be tryed by a Jury. And *Stamfords* Pleas of the Crown, *lib.* 1. *fol.* 51. citing this Book, saies thus: So this proves, That by the Common-Law, before the Statute, &c. the Admiral shall not have Jurisdiction, unless upon the High-Sea; which proves his Jurisdiction by the Common-Law upon the High-Sea. *Ex quo sequitur*, that his Jurisdiction was by the Common-Law, and then 'tis so antient, that the Commencement cannot be known. Whence I conclude, that this Authority did not begin of King *Edw.* 3. as *Monsieur Lambert* upon uncertain Conjectures supposeth.

Pasch. 9 Jac. *Regis.* 81.

It was Resolved by the two Chief Justices, Chief Baron, the Attorney and Sollicitor, That the King may erect any Name of Dignity which was not before; and for that Reason the King may Create a Baronet, to him and his Heirs-males of his Body issuing.

It was Resolved, That if he Create him not of some Place, he shall not have an Estate Tail, but Fee-simple conditional, forfeitable for Felony; but if he Create him Baronet of a Place, then he shall have an Estate-Tail within the Statute, *West.* 2. And the King may Grant to such Precedency before Knights Bannerets,

Knights of the Bath, and Kinghts-Batchelors: And also he may Grant Precedency to their Wives, Sons, and Daughters, &c.

The King cannot Create any Dignity above the Dignity of a Baronet, and under the Dignity of a Baron: And the creation of this Dignity of a Baronet shall not discharge the Heir to be in Guard.

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81. Pasch. 9 Jacobi Regis. *Accessary in Treason*, &c.

Note, That in Trespass and Treason, there are no Accessaries, but all are Principles: But in Felony, above the sum of 12 d. there, and in case of death, &c. there may be Accessary as well before as after. *In Petit Larceny* there can be no Accessaries, for the smallness of the Felony: Then the Case is, A. *Counterfeits the Great Seal of* England, *and* B. *knowing that he did Counterfeit it, receives, abets, and comforts him.* If B. in this Case be Guilty of Treason, is the Question: And it seems he is not; for though *A.* by the Counterfeiting be a Traytor, yet the abetting, &c. cannot make B. an Accessary, because at the time of Counterfeiting it, he did not know it; but if one before the Act be done, procure another to Counterfeit the Great-Seal, there it is High-Treason; and in the Indictment he may be charged with the Fact. And this appears to me very evident in Reason, and agrees with our Books; as 19 *H.* 6. 47. 6. he who is consenting to the making of false Money, commits High-Treason, for he is *Particeps Criminis* before the Fact: But it is held in *Conyers* Case, *Mich.* 13 & 14 *Eliz. Dyer* 296. that in the same Case, if one after the Fact done know thereof, and receive the Party, this is but Misprision of Treason; and with this accords 3 *H.* 7. 10. which diversity *Stam. Pleas of the Crown*, fol. 3. hath not well observed. Vide *Dyer* 298. vide *le Stat.* 27 *Eliz.* C.

2.

Pasch.

Pasch. 9 Jacobi Regis. *Sir William Chancys Case.* 82.

In this Term Sir *William Chancy* having the priviledg of this Court, and being a Prisoner in the Fleet, was brought to the Bar by *Habeas Corpus*, by the Guardian of the *Fleet*; who returned, That the said Sir *William* was committed to the *Fleet* by Warrant from the High-Commissioners in Ecclesiastical Causes, which Warrant follows in these words, *viz.*

Those are to Will and Require you in his Majesties Name, by Vertue of his High-Commission &c. to us and others directed, &c. That herewithal you take and receive into your Custody the Body of Sir William Chancy *Knight, whom we will that you keep, &c. untill further Order, &c. letting you know the cause of his Committment to be, for that being at the Suit of his Lady convented before &c. for Adultery, and expelling her from his Company, and Co-habiting with another Woman, without allowing her any competent Maintenance; and by his own Confession convict thereof, he was thereupon enjoyned to allow his Wife a competent Maintenance, &c. and to perform such Submission and other order for his Adultery as by Law should be enjoyned him, which he expresly refused to do in contempt, &c. Given at* London 19 Martii, 1611. *subscribed* Henry Mountagu, George Overall, Thomas Morton, Zach. Pasfield.

And it was moved by *Nicholas Serjeant*, a Councel with Sir *William*, that this return was insufficient.

1. Because Adultery ought to be punished by the Ordinary, and not by the High-Commissioners, on which the Offender is remediless; and can have no appeal; *Quod fuit concessum per Coke, Warberton* and *Foster*, but *Walmesly* doubted of Adultery.

2. That by force of the Act of the 1. of *Eliz.* the High-Commissioners cannot imprison Sir *William* for Adultery, nor for denying Alimony to his Wife: And

83. *Doderidge*, the Kings Serjeant, of Council on the other ſide, did not detend the Imprisonment to be lawful.

And it was clearly agreed by *Coke*, *Walmesly*, *Warberton*, and *Foster*, That the Commissioners had not power to imprison in this Case. And *Walmsly* said, That though they have used this Power for twenty years without any exception; yet when it comes before them judicially, they ought to Judge according to Law; and upon this Sir *William Chancy* was Bailed.

And it was resolved *per totam Curiam*, That when it appears upon the Return, that the Imprisonment is not lawful, the Court may discharge him of Imprisonment.

Also it was Resolved, That the Return was insufficient in form.

1. It is not shewn when the Adultery was committed.

2. He was enjoyned to allow his Wife a competent Maintenance without any certainty, and to perform such submission, &c. as by Law shall be enjoyned, which is all *in futuro*, and uncertain. *Vide* in my Treatise at large the Reasons and Causes why the High-Commissioners may sue and imprison, Vide *Pasch.* 42 *Eliz. Rot.* 1209.

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83. Pasch. 9 Jacobi Regis. *Empringham's Case.*

In this Term a Case was moved in *Star-Chamber* upon a Bill exhibited by the Attorney-General against *Robert Empringham* Vice-Admiral in the County of *York*, *Marmaduke Ketthewell*, one of the Marshals of the Admiralty, and *Thomas Harrison*, an Informer in the same Court for Oppression and Extortion, in Fining and Imprisoning divers of the Kings Subjects in the said County, which no Judge of the Admiralty can justifie, because it is not a Court

a Court of Record; but they proceed according to the Civil Law, and upon their Sentence no Writ of Error lyeth, but an Appeal. Also the said *Empringham* hath caused divers to be cited, to appear before him for things done in the Body of the County, which were determinable by the Common Law, and not before the Admiralty, whose authority is limited to the High Sea. And for these and other Oppressions they were fined and imprisoned, and sentenced beside to make Restitution, &c.

Trin. 9 Jacobi Regis. 84.

Memorandum, That upon the *Toursday* before this Term, all the Justices of *England*, by the Kings Command, were assembled in the Council-Chamber at *Whitehall*, where was, *Abbot*, Archbishop of Canterbury, and with him two Bishops, and divers Civillians; the Archbishop complained of Prohibitions out of the Common-Pleas, and delivery of Persons by *Habeas Corpus*, but chiefly of Sir *William Chancy*. I defended our proceedings according to my Treatise thereof, which I delivered before the High-Commissioners: And after great dispute between the Archbishop and Me, at last he said, He had a Point not yet touched upon in my Treatise, which would give satisfaction to the Lords and Us also, and upon which he would rely; And that the Clause of Restitution and Annexation, *viz. And that all such Jurisdictions, &c. Spiritual and Ecclesiastical, as by any power Spiritual hath heretofore, or hereafter lawfully may be used, &c. for visitation of the Ecclesiastical State and Persons, and for Reformation, Order, and Correction of the same, and of all Errors, Heresies, Schisms, &c. shall for ever by authority of this present Parliament, be united and annexed to the Imperial Crown of this Realm.* And it was said, That *H.* 8. and *Ed.* 6. did give Power by their Commissions to divers,

to

to impose Mulcts, &c. in Ecclesiasticall Causes, &c. and upon this he concludes, That this having been used before 1 *Eliz.* this is given to Queen *Eliz.* and her Successors. Also inasmuch as by 2 *H.* 4. and 2 *H.* 7. the Jurisdiction Ecclesiastical may Fine and Imprison in particular Causes, therefore Power to Fine and Imprison in all Ecclesiastical Causes is given to the King: And this he said he uttered, that it might be answered.

1. To which, I for a time gave this Answer, That it was good for the Weal-publick that the Judges at the Common-Law should interpret the Statutes within this Realm.

2. It was said by me, That before the Statute of 1 *Eliz.* no Ecclesiastical Judge may impose a Fine, or Imprison for any Ecclesiastical or Spiritual Offence, unless there be Authority by Act of Parliament: And this was so affirmed by all the Justices.

Vide my Book of Presidents, the Commission at large to *Cromwel* to be Vicegerent.

85. Afterwards in this very Term the Privy-Council sent for the Justices of the Common-Pleas only, and there the Reasons of the said Resolution were largely debated, and strong Opposition made by *Egerton* Lord Chancellor, but the Justices of the Common-Pleas remained constant in their Resolution: Afterward the Council sent for the chief Justice of the Kings Bench, Justice *Williams*, Justice *Crook*, Chief Baron *Tanfield*, *Snig*, *Altham*, and *Bromly*, who were not acquainted with the Reasons of the said Rule of the Common-Pleas, nor knew why they came before the Council; And hearing the Lord Chancellor affirm, That the High-Commissioners have alwayes by the Act 1 *Eliz.* imposed Fines and Imprisonments for exorbitant Crimes, (without any Conference with us, or among themselves, or hearing the matter debated,) were of Opinion with us: And after at another day this same Term, the said Judges of the Kings Bench, Barons of the Exchequer, and Justice *Fenner* and *Yelver-*

ton,

ton, who were omitted before, and We the Justices of the Common-Bench were commanded to attend the Council. And being all assembled, We of the Common-Pleas were commanded to retire, and then the King demanded their Opinions in certain Points touching the High-Commission, wherein they unanimously agreeing, We, *viz. Coke*, *Walmesly*, *Warberton*, and *Foster*, were called before the King, Prince and Council, where the King declared, That by the Advice of his Council, and the Justices of the Kings Bench and Barons, he will reform the High-Commission in divers Points, which after he will have to be obeyed in all Points.

Whereupon I said to the King, That it was grievous to Us, his Majesties Justices of the Bench, to be severed from our Brethren, but more grievous, that they differed from us in Opinion, without hearing one another, especially since in what we have done in Sir *William Chancys* Case, and others the like concerning the Power of the High-Commissioners, was done judicially in open Court, upon argument at the Bar and Bench. And further I said to the King, that when we the Justices of the Common-Pleas see the Commission newly reformed, We will, as to that which is of Right, seek to satisfie the Kings expectation; and so We departed, &c.

Trin. 9 Jac. Regis. *Stockdale's Case in the Court of Wards.* 86.

The King by Letters Patents dated 9. *April*, the ninth year of his Reign, did Grant to *William Stockdale* in these words.

Such, and so many of the Debts, Duties, Arrearages, and Sums of Money being of Record in our Court of Exchequer, Court of Wards, Dutchy-Court, or within any Court or Courts, &c. in any year, or several years from the last year of the Reign of *H.* 8. to the 13th. year

year of Our Dear Sister, as shall amount to the sum of 1000 l. To have, take, levy, &c. the said Debts, &c. to the said *William Stockdale* als Executors, &c.

And in this Case divers Points were resolved:

1. That the said Grant of the King is void for the incertainty, for thereby no Debt in certain can pass: As if the King have an 100 Acres of Land in *D.* and he Grants to a Man 20 Acres of the Lands in *D.* without describing them by the Rent, Occupation, or Name, &c. this Grant is void.

2. When the Patentee Claims by force of this word *Arrearagia.*

It was resolved clearly, That he shall not have Arrearages of Rents, Reliefs, and mean Rates of Lands, &c. in the Court of Wards, &c. if the Patent go not further.

But the *Proviso* in the end of the Patent, *viz.* Provided, that the said *William Stockdale* shall take no benefit by any means of Arrearages of any Rents, &c. until Sir *Patrick Murray* and others be paid the sum of 10000 l. &c. hath well explained what Arrearages the King intended: But clearly mean Rates are not within the words, for they are the Profits of Demesne Land.

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87. *Trin. 9 Jacobi Regis.*

Divers men playing at Bowles at great *Marlow* in *Kent*, two of them fell out; and a third man, who had not any quarrel, in revenge of his Friend, struck the other with a Bowl, of which he dyed: This was held Manslaughter, because it happened upon a suddain motion.

87. In the same Term a special Verdict divers years past found in the County of *Hertford*, which was, That two Boyes fighting together, one was scratched in the Face, and bled very much at the Nose, and so he run three quarters of a Mile to his Father, who seeing his Son so abused

abuſed, he took a Cudgel and run to the place where the other Boy was, and ſtroke him upon the Head, upon which he dyed. And this was held but Man-ſlaughter, for the Paſſion of the Father was continued, and no time to judge it in Law Malice prepenſe: And this Caſe was moved *ad menſam, &c.*

Mich. 9 Jac. Regis. 87.

Memorandum upon *Thurſday* in this Term, a High Commiſſion in Cauſes Eccleſiaſtical was publiſhed in the Archbiſhops great Chamber at *Lambeth*, in which I, with the Chief Juſtice, Chief Baron, Juſtice *VVilliams*, Juſtice *Crooke*, Baron *Altham*, and Baron *Bromly* were named Commiſſioners among all the Lords of the Council, divers Biſhops, Attorney and Solicitor, and divers Deans and Doctors in the Cannon and Civil Laws: And I was commanded to ſit by force of the ſaid Commiſſion, which I refuſed for three Cauſes.

1. Becauſe neither I nor any of my Brethren of the Common-Pleas, were acquainted with it.

2. Becauſe I did not know what was contained in the new Commiſſion; and no Judge can execute any Commiſſion with a good Conſcience, without knowledg; for *Tantum ſibi eſt permiſſum, quantum eſt Commiſſum.*

3. That there was not any neceſſity of my ſitting, who underſtood nothing of it, ſo long as the other Judges, whoſe adviſe had been had in this new Commiſſion, were there.

4. That I have endeavoured to inform my ſelf of it, by a Copy from the Rolls, but it was not enrolled.

5. None can ſit by force of any Commiſſion, till he hath taken the Oath of Supremacy according to 1 *Eliz.* and if I may hear the Commiſſion read, and have a Copy to adviſe upon, I will either ſit, or ſhew cauſe to the contrary. The Lord Treaſurer perſwaded me to ſit, but I utter-

I utterly refused it, and the rest seemed to incline. Then the Commission was openly read, containing divers Points against the Laws and Statutes of *England*: At hearing of which, all the Judges rejoyced they sate not by it. Then the Archbishop made an Oration; during all which, as the reading of the Commission, I stood, and would not sit; and so by my Example, did the rest of the Judges. And so the Archbishop appointed the great Chamber at *Lambeth* in Winter, and the Hall in Summer; and every *Thursday* in the Term at two a clock Afnoon, and in the Forenoon one Sermon.

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88. Mich. 9 Jacob. Regis.

In this Term, the Issue, in an Information upon the Statute 2 *H.* 6. c. 15. was tryed at the Bar; and upon Evidence upon the words of the Statute, which are, That every person that sets or fastens in the Thames, any Nets or Engines called Trincks, or any other Nets, to any Posts, &c. to stand continually day and night, forfeits to the King 100 *s.* for every time, &c. And the Defendants having set and fastned Nets called Trincks in the *Thames*, &c. to Boats, day and night, as long as the Tide served, and not continually.

The Question was, If this was within the Statute; and it was clearly Resolved, That it was within the Statute; for the Nets called Trinks cannot stand longer than the Tyde serve; and for this the word continually shall be taken for so long as they may stand to take Fish; for *lex non intendit aliquid impossibile.*

Mich.

Mich. 9 Jacob. Regis. *Shulters Case in the Star-Chamber.* 89.

The Case was such; *John Shulter* of *Wisbich*, of the age of 115 years, had Issue *John* his eldest Son, and others, *viz. Christopher*, *Richard*, &c. and being seized of Land in Fee of 100 Marks, *per annum*, value, his eldest Son being dead, and his Grandchild *John* within age, he gave direction for a Lease to be made of a Farm called *Roushal*, to *Christopher*, during the minority of his Grandchild, rendring the antient Rent, with power of Revocation, and of Lands in *Yatesbury* to *Richard* in the same manner; and the same time *Christopher* and *Richard*, by the Covin of one *Woodruff* a Scrivener, 25 *Eliz.* drew two Leases to *Christopher* and *Richard* for 51 years, rendring 4 *d. per annum*, and without any power of Revocation; *John Shulter* the Grandfather being blind with age, and *Woodruff* telling him they were according to his direction. And thereupon *John Shulter* the Grandfather sealed and delivered them. And it was resolved by the Lord *Ellesmere* Chancellor, and two Chief Justies, That the said Indentures could not bind the said *John Shulter*, because he was blind: and the effect was declared to him other than in truth it was. It fully agreed with *Masters* Case, in the second part of my Reports, *fol.* 3.

Mich. 9 Jacobi Regis. *Sir* Anthony Ashley's *Case.* 90.

The Case was this; Sir *James Creyton* had bought a pretended Right of and in the Mannor of *Lydd* and *Millisent*, and divers other Lands, of which Sir *Anthony* had long possession: Upon which, divers Motions were made concerning Fines, acknowledged to be staid, &c. in the

the *Common-Bench*; and Sir *James* not prevailing in it, entred into a wicked Conspiracy, with several other Defendants in the Cause, to accuse the said Sir *Anthony* of some Capital Crimes, whereby he should forfeit all his Lands, Goods, and Chattels, which they should share amongst them; and in the end *Henry Smith*, formerly a Servant to Sir *Anthony*, was suborned to accuse the said Sir *Anthony*, of the Murther of *William Rice*, late Husband of *Mary Rice*, one of the Defendants, which *William* was dead 18 years before; and *Smith* was to have 500 *l.* for his pains, to have a place procured him in the Kings Guard in Ordinary, a Protection also from the King against his Creditors, and a General Pardon. Of all which, *Smith* would have assurance, before he would make any Accusation of the said Sir *Anthony*: Whereupon Articles in Writing were drawn, ingrossed and sealed between Sir *James Creyton* of the one part, and *John Cantrel*, Servant to *Hunnings*, by *Smith*'s Consent, and to his use, on the other part: By which Sir *James* Covenanted, that the said *Cantrel*, and his Heirs, after the Conviction and Attainder of Sir *Anthony*, shall have a sixth part of his Mannors, &c. In consideration whereof, *Cantrel* Covenanted, that he should procure Witnesses, to Convict the Plaintiff of Murther, or other Capital Crimes, &c. Which Articles were sealed 16 of *Feb.* 7 *Jac.* And for the performance of the said Articles, Sir *James* gave Bond of 8000 *l.* to *Cantrel*. Within two dayes after, *Smith* counterfeits himself sick, and then pretending to disburthen his Conscience, reveales the said Murther, and accused himself for poysoning the said *William Rice*, by the said Sir *Anthonies* Command; so that he himself was Principal. Upon this Sir *James* procures *Mary Rice*, the Widow of the said *William Rice*, to prefer a Petition to the King, importing the Accusation aforesaid: Which Petition, the King referred to the Chief Justice of the *Kings-Bench*, who, after full Examination, certified the King, that he found a false Conspiracy, to inlict Sir *Anthony*, without any just

ground

ground, and certified alſo the effect of the Articles: Upon which the King, by Advice of the Privy-Council, thought the matter fit to be ſentenced in the *Star-Chamber*; Which in the ſame Term, upon ordinary proceeding, was heard by ſix dayes: And it was objected by the Defendants Counſel, That the Bill, upon the ſaid Conſpiracy, did not lye; and that it would be dangerous to maintain it; for it will deter men to proſecute againſt great Offenders, whereby they will paſs unpuniſhed: And by the Law, Conſpiracy lyes where a man is indicted, and *legitimo modo acquictus*, but here he was never indicted, &c.

But to this, it was Anſwered, and Reſolved, by the Lord Chancellor, the two Chief Juſtices, and all the Court, That in this Caſe, the Bill was maintainable; though the Party accuſed was not indicted and acquitted before, as it was Reſolved in this Court, *Hill.* 8. *Jac.* in *Poulter's* Caſe. Beſides, be Sir *Anthony* guilty or no, the Defendants are puniſhable, for promiſing Bribes and Rewards to *Smith*, to accuſe the Plaintiff, and the Articles to ſhare Sir *Anthonies* Eſtate after Attainder; And there is a great Indignity offered to the King, in aſſuming to Covenant, that the King ſhall protect or pardon, or that any man's Eſtate may be ſhared before Attainder.

And it appeared by many Witneſſes, that *William Rice* dyed not of any poyſoning, but of a horrible Diſeaſe got by his diſſolute life, which with Reverence cannot be ſpoken.

And in this Caſe, it was Reſolved, That if Felony be done, and one hath ſuſpition upon probable matter, that another is guilty of it, he may arreſt the party ſo ſuſpected, to bring him to Juſtice. But in this Caſe, three things are to be obſerved:

1. That a Felony be done.

2. That he that doth arreſt, hath ſuſpition upon probable cauſe.

3. That he himself, who hath the ſuſpition, arreſt the party.

Reſolved alſo, That if Felony be done, and common fame and noiſe is, that one hath committed it, this is good cauſe for him that knowes of it to arreſt the party: and with this agrees the Book, 2 H. 7. 15, 16. 15 H. 7. 5. 20 H. 7. 12. 21 H. 7. 28. 7 Ed. 4. 20. 8 Ed. 4. 27. 11 Ed. 4. 4. 6. 17 Ed. 4. 5. 6. 20 Ed. 4. 6. B. 7 H. 4. 25. 27 H. 8. 23. 26 H. 8. 9. 7 Eliz. Dy. 226.

92. Hill. 9 Jac. Regis.

In this Term, the Attorney and Sollicitor conſulted with me, if at this day, upon Conviction of an Heretick before the Ordinary, the Writ *de Hæretico cumburendo* lyeth; and it ſeems to be clear that it doth not: for the Reaſons and Authorities that I have reported, *Trin. 9 Jacob.* before: But after, they conſulting with *Fleming* Chief Juſtice, *Tanfield* Chief Baron, and *Williams* and *Crook*: And they, upon the Report of Dr. *Coſins*, mentioned in my ſaid Report, and ſome Preſidents in Queen *Elizabeth*'s time, they certified the King, that the ſaid Writ lyeth; but that the moſt ſure way was to convict the Heretick before the High Commiſſioners.

92. Paſch. 10 Jac. Regis. *The Lord* Vaux *his Caſe.*

In this Term, the Lord *Vaux* was indicted of a Premunire in the *Kings-Bench*, upon the New Statute, for refuſing the Oath of Allegeance: upon his Arraignment, he prayed he might be tryed *per Pares*. But it was *Reſolved*, That he ſhall not; for that *Magna Charta, cap. 29. Nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parium ſuorum*, is onely to be underſtood of Treaſons, Miſpriſion of Treaſon, Petit Treaſon, and Felo-

ny,

ny, and their Accessaries, &c. But *Premunire* is but a contempt, and Pardon of all Contempts pardons it. Whereupon the Lord *Vaux* confessed the Indictment, *Vide Lamb. Justice of Peace*, 520. *Dalisons* Report accordingly. *Vide Stamford*, &c.

Trin. 10 Jacob. Regis. *Countess of* Shrewsbury's *Case.* 93.

In this Term, before a select Councel at *York*-house, the Countess of *Shrewsbury* (Wife of *Gilbert* Earl of *Shrewsbury*) then Prisoner in the Tower, was brought, and by the Kings Attorney and Sollicitor was charged with a high Contempt of dangerous consequence; declaring, That the Lady *Arbella*, being of the Blood-Royal, had marryed *Seymor*, the Earl of *Hertford*'s second Son, without the King's Consent, for which he was committed to the Tower, and had escaped and fled beyond the Seas. And the Lady *Arbella* being under restraint escaped also, and embarked her self on the Sea, but was taken ere she got over: of which flight of the Lady *Arbella*, the said Countess well knew, as is directly proved by *Crompton*, and not denied by the Lady *Arbella*. And admitting the Lady *Arbella* had no evil intent against the King; yet when she fled, and should be inviron'd with Evil Spirits, *cum perversis perverti possit.*

Now the Charge was in two Parts:

1. That the Countess of *Shrewsbury*, being by the King's Command called to the Councel-Table, and being required by the Lords, to declare her knowledge touching the said Points; she answered, she would not answer particularly; and being again by the King's Commands asked by the Councel at *Lambeth*, she refused for two Causes:

1. Because she had made a Vow, that she would not declare any thing in particular touching the said Points; and (the said) it was better to obey God, than Man.

2. She stood upon her Priviledge of Nobility, *viz.* to answer, when judicially called before her Peers: such Priviledge having been allowed to *William* Earl of *Pembroke*, and the Lord *Lumly*.

94. 2. The second Point of the Charge was, That when the Answer she had made was put in Writing, and read to her, yet she refused to subscribe the same: Which Denial was urged by the King's Counsel, as a high contempt, &c. And the Countess hearing the Charge, yet persisted in her obstinate Refusal, for the same Reasons she insisted on as before: And the Lord Chancellor began, and the Archbishop and the other Lords adjudged it a great and high Contempt: And that no such allowance was to the Earl of *Pembroke*, or Lord *Lumly*, as was supposed. And the Archbishop, and Earl of *Northampton*, proved by Scripture, that the said Case now was against the Law of God.

All that the Justices said was, That they might well be silent; but that *silentium in Senatu est vitium*: and therefore they briefly speak of three things:

1. Whether the Refusals aforesaid were Offences in Law, against the King, his Crown, and Dignity.

2. What Proceeding this is; and if justifiable by President or Reason.

3. What the Offences are, and how punishable.

1. As to the first: It was resolved by the Justices, and Master of the Rolls, that the denying to be examined, was a high Contempt against the King, his Crown, and Dignity: and upon hope of Impunity, it will be an encouragement to Offenders, as *Fleming* Chief Justice said, to enterprize dangerous Attempts.

The Master of the Rolls said, the Nobility in this Case, had no more priviledge to deny to be examined, than any other Subject.

Also, if one Noble be sued, and a Peer be sued in *Star-Chamber* or *Chancery*, they must answer upon their Oaths; And if produced as a Witness, they ought to be

sworn:

ſworn: And therefore for maintaining of Order, the Chief Juſtice ſaid he would recite ſome of thoſe Honourable Priviledges, which the Law of *England* attributes to Nobility.

1. If a Baron Viſcount, Earl, &c. be Plaintiff in any Action, and the Defendant will plead, that the Plaintiff is not a Baron, &c. this ſhall be tryed onely by the Record in *Chancery*, which imports by its ſelf ſolid truth.

2. Their Perſons have many Priviledges in Law. 95.

1. At a Subj.cts Suit they ſhall not be arreſted.

2. Their Bodies are not ſubject to Torture, *in cauſa criminis Læſæ Majeſtatis.*

3. They are not to be ſworn in Aſſiz's, Juries, or Inqueſts.

4. It is Felony in any Servant of the King, named in the *Checquer* Roll, to compaſs or intend to kill any Lord of Parliament, or of the King's Councel.

5. In the *Common-Pleas*, a Lord ſhall have Knights returned of his Jury.

6. He ſhall have Day of Grace.

7. Shall not be Tryed in caſe of Treaſon, Felony, or Miſprision of them, but by thoſe that are Nobles and Peers.

8. In Tryal of a Peer, the Lords of Parliament ſhall not ſwear, but give their Judgment, *Super Fidem & Ligeantiam Domino Regi debitam.* And the King honours with Nobility for two Cauſes.

1. *Ad conſulendum*; and therefore he gives them a Robe.

2. *Ad Defendendum Regem & Regnum*; and therefore he gives them a Sword.

And therefore, as they derive their Dignities with thoſe Honourable Priviledges from the King; to deny to anſwer, being required by the King, is a high Contempt, accompanied with great Ingratitude.

This Denial is *contra Ligeantiam ſuam*, as appears by

the Antient Oath of Allegeance: And the Law hath greater account to a Noble-mans Allegeance, then one of the Commons, because the breach of their Allegeance is more dangerous; for *Corruptio optimorum est pessima.*

96. 2. As to the second Point, *viz.* concerning the manner of Proceedings.

1. Privative: It is not to fine, imprison, or inflict corporal punishment; for that ought to be assisted in some Court Judicially.

2. Positive: The Fine is *ad monendum*; or at most, *ad minandum*: It is, *ad instruendum non ad destruendum.*

This selected Councel, is to express what punishment this Offence justly deserved, if judicially proceeded against in the *Star-Chamber*: Therefore this Proceeding is out of the King's Mercy to this Lady; that seeing her Offence, she might submit to the King, without any Judicial Proceedings against her. And though the Law puts Limits to the King's Justice, it doth not so to his Mercy: *Et ideo processus iste est regalis plane & rege dignus.* And this manner of Proceeding, is fortified by the President of the Earl of *Essex*, against whom such Proceedings were in this very place, 42 & 43 *Eliz.*

As to the last Point, It was resolved by all, *quasi una voce*, that if a Sentence should be given in the *Star Chamber*, she should be fined 20000 *l.* and imprisoned during the Kings pleasure.

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97. Trin. 10 Jacobi Regis. *Robert Scarlet's* Case.

Note, That at the Sessions of Peace lately holden at *Woodbridge* in *Suffolk*, the Sheriff returned a Grand Inquest, of which one *Robert Scarlet* desired to be one: But the Sheriff knowing the malice of the man, refused to return him: Yet by Confederacy with the Clark, who read the Pannel, he was sworn of the Grand Inquest; and being amongst them of the Grand Inquest (though not returne

returned) as one of them, of his malice, and upon his own knowledge, as he pretended, indicted 17 honest men upon divers penal Laws: Some of the Justices looking over the Bills, and seeing so many honest men indicted, as they supposed, maliciously, demanded what Evidence they had to find the said Bills; and they answered, By the Testimony and Cognizance of one of themselves, viz. *Robert Scarlet*: And upon Examination it appeared, that the said *Robert Scarlet* was not returned, but had procured himself to be sworn by Confederacy, as aforesaid: For which Offence, he was indicted at the Summer Assizes following, to *Jac.* held at *Ely*, upon the Statute 11 *H.* 4. *c.* 9. And he pleaded not guilty: All the especiall Matter aforesaid being proved, he was found guilty by a substantial Jury. And in this Case, divers Points were considered;

1. Whether Justices of Assize have power to punish this offence or no? And it was held affirmatively, *scil.* by force of their Commission of *Oyer* and *Terminer*. And if the Act be indefinite, or general, and doth not give Jurisdiction to any Courts in special, the general words of Commission of *Oyer* and *Terminer* extends to it.

Vide 7 Eliz. Dyer. Commissioners of *Oyer* and *Terminer*, may inquire of Offences against Penal Statutes, unless the Statute appoint them to be determined in any Court of Record. And the Opinion there, that in any Courts of Record, are restrained to the four ordinary Courts at *Westminster*, is not held for Law; as the Statute 5 *Ed.* 6. 14. against Forestallers, &c. gives the Penalty to be recovered in any Court of Record: And Justices of Assize, in regard of their Commission of *Oyer* and *Terminer*, have always enquired thereof: So the 33 *H.* 8. 9. of unlawful Games; And of Woods, 35 *H.* 8. *c.* 17. and many others. 98.

2. The second consideration was upon the Statute, 11 *H.* 4 *cap.* 9. and it was held, that *Robert Scarlet* was an Offender within that Statute; because knowing he

was not returned of the Grand Inquest, procured himself, by false Conspiracy, to be sworn as aforesaid.

3. The third Consideration was had of 3 *H.* 8. 12. which alters the Act of the 11 *H.* 4. in part, as to denomination: But in regard, that still by that Act none can beof any Grand Inquest, but by Return of the Sheriff: And for this the Act 3 *H.* 8. 12. hath not altered the Law, as to the Offence of *Robert Scarlet.*

4. The said Act 11 *H.* 4. hath made a new Law, *viz.* That any Indictment found against the said Act shall be void: So that this may draw in Question, all the Indictments found at the same Sessions. And for this Judgment was given, that he should be fined and imprisoned.

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99. Trin. 10 Jac. Regis. *Baker and Hall's Case.*

2

* *Note*, Upon Consideration of the Statute, 3 *H.* 7. *c.* 1. It was *Resolved* by *Coke*, Chief Justice of the *Common-Pleas*; *Yelverton*, *Williams*, *Suig*, and others, That whereas it is provided, that what person soever takes a Woman so against her Will, &c. in respect of this Word (*So*) which hath relation to the Preamble: It was agreed by all, that if the Wife hath nothing, nor is Heir apparent, it is out of the Statute: for it would not have been so curious in describing the Person, and all in vain. And Clergy is taken away by the 39 *Eliz. cap.* 9. for Principals or Procurers before. *Vide Stamf. fo.* 37. *b.* and so was the Law taken, 3 & 4 P. & *M. Vide Lamb* 252. *Note*, Receivers of the Woman are Principals; but not the Receivers of them who took the Woman. *Vide Lamb. ibid.*

99. * *Note*, I saw a Report in Queen *Mary*'s time, upon the 50 *Ed.* 3. *cap.* 5. and 1 *R.* 2. *cap.* 15. concerning arresting Priests in Holy Church, that the said Statutes are but in affirmance of the Common-Law; and 'tis there held, that *eundo*, *redeundo*, *morando*, for to celebrate Divine Service,

Service, the Priest ought not to be arrested, nor any who aid him in it; and that the Party grieved, may have an
c Action upon the Statute, 50 *Ed.* 3. For though an Act doth not give an Action, yet Action lyeth upon it, 7 *H.*6. 39. &c. 2 *H.*5. and 4 *Ed.*4. 37. *Vide Register in breve super Stat.*

Note, If a man be convicted, or hath Judgment of Death for Felony, he shall never answer by the Common Law, to any Felony done before the Attainder, so long as the Attainder remains in force: *Vide* 8 *Eliz. c.* 4. 18 *Eliz.* 7. And at this day, if a man be adjudg'd to be hang'd, and hath his Pardon he shall never answer to any Felony before; for he cannot have two Judgments to be hang'd. *Aliter*, If the first Attainder by Errour be reversed. *Vide* 10 *H.*4. *Coron.* 227. *Case, del Appeal*, &c. /100.

A man seized of a Mannor, to which he hath stray appendant by Prescription, &c. by his Bayley he seizeth an Ox as a Stray in the Mannor, and makes Proclamation according to Law, and within the Year and Day, lets the Mannor with all Royalties, &c. And *Dyer* Sergeant moved the Court, who should have the Stray: And *Brown* Justice, was of Opinion, that the Lessor should have it. But all the Justices were against him, that the Lessee shall have it, because the property of the Stray is not altered before the Year and Day; and till then, the Lord of the Mannor hath but the custody of it. In Dr. *Hutchinson*'s Case, Parson of *Kenn* in *Devonshire*, It was *Resolved*, *per totam Curiam*, That if any shall receive or take Money, Fee, Reward, or other Profit, for any Presentation to a Benefice with Cure; although in truth, he which is presented be not knowing of it: yet the Presentation, Admission, and Induction, are void, *per expressa verba Statuti*, 31 *Eliz. cap.* 6. and the King shall have the Presentation *hac vice*: But if the Presentee be not cognizant of the Corruption, then he shall not be within the Clause of Disability in the same Statute: and so it was Resolved by all the Justices in *Fleetstreet*, *Mich.* 8. *Jac. fo.* 7. *vide verba statuti*. /102. /100.

Hugh

101. *Hugh Manneyes* Case.

In an Information in the *Exchequer* against *Hugh Manney* Esq; the Father, and *Hugh Manney* the Son, for Intrusion and cutting a great number of Trees in *Merioneth shire*, the Defendants plead not guilty; and one *Rowland ap Eliza* produced as a Witness for the King, deposed upon his Oath, that *Hugh* the Father and Son joyned in sale of the said Trees, and commanded the Vendees to cut them down; The Jury found upon this great Damages for the King; and Judgment was given, and Execution had of a great part.

Hugh Manney the Father exhibited a Bill in the *Star-Chamber* at Common-Law, against *Rowland ap Eliza*, and assigns the Perjury in this; That the said *Hugh* the Father, did never joyn in Sale, nor command the Vendees to cut the Trees; and *Rowland ap Eliza* was convict of the Perjury, by all the Lords in the *Star-Chamber*; and it was *Resolved* by all, That it was by the Common-Law punishable before any Statute.

101. *Hyes* Case, in *Curia Wardorum*.

By Inquisition in the County of *Middlesex*, *Anno* 6 Jac. by vertue of a *diem clausit extremum*, after the death of *Humphry Willward*, it was found, that the said *Humphry* died seized of a Messuage, and 26 Acres of Land in *Stepney*, and that *John Willward* was his Heir, being 14 years, and 9 days old; and that the Land was held of the King, *in capite*, by Knights Service. *John Willward* died within age, and by Inquisition in *Middlesex*, 8 *Jun. Anno Jac.* by vertue of a Writ of *Devenerost*, after the said *John*'s death, it was found, that *John* dyed seized in Ward to the King; and that the said Messuage and Lands, at the ti-

of the said *John*'s death, were holden of the Dean of *Pauls*, as of his Mannor of *Shadwel*.

All the mean Rates incurred in *John*'s life-time, are paid to the King.

1. The Questions are: 1. Whether by *John*'s death, and finding of the mean Tenure in the *Devenerunt*, the first Office granted to Points be determined.

2. Whether the Tenure found by the first Office may be traversed.

And as to these Questions it was *Resolved*, by the two Chief Justices, and chief Baron, That where the said *John* dyed, the Office found by force of the *Diem clausit extremum*, after *Humphries* death, whereby the King was entituled to the Guardianship of *John*, hath taken its effect, and is executed, and does remain as Evidence for the King after *Johns* death, but yet is not traversable; for it is traversable during the time it remains in force onely, and the Jurors upon the *Devenerunt*, after the death of the said *John*, are at liberty to find the certainty of the Tenure, and they are not concluded by the first Inquisition; and with this agrees, 1 *H.* 4. 68. And this appears by the diversity between the Writ of *Diem clausit extremum*, and the *Devenerunt*, which is but in one Point; to wit, the *Diem clausit extremum* is general, And the *Devenerunt* is not general, but does restrain onely the Lands and Tenements, *quod devenerunt*, &c. And thus it was Resolved *anno Jacobi*, in the Court of *Wards*, in the Case of *Dune Lewis*. 102.

Award of Capias Utlagatum, *by Justices of the Peace.* 102.

In this same Term, the Opinion of all the Court of *Common-Pleas* was, That if one be out-lawed before Justices of Assize, or Justices of Peace, upon an Indictment of Felony, that they may award a *Capias utlagatum*; and so was the Opinion of *Periam* Chief Baron, and all the Court

Court of *Exchequer*, as to Justices of Peace: for they that have power to award process of Outlawry, have also power to award a *Capias utlagatum*. See 34 *H.8.c.*14. See *Lamb.* Justice of Peace, *fol.*503. *contra.* But see 1 *Ed.* 6. *cap.* 1. Justices of Peace, in case of Profanation of the Sacrament, shall award a *Capias utlagatum* throughout all *England*.

/83. Hersey's *Case*, *Star-Chamber*.

John Hersey Gent. exhibited his Bill in the *Star-chamber*, against *Anthony Barker* Knight, *Thomas Barker* Counsellor at Law, *Robert Wright* Doctor of Divinity, *Ravensroft* Clerk, and *John Hatts*; and thereby charged the Defendants with forging the Will of one *Margery Pain*; and the Cause came to Hearing, *ad requisitionem defendentium*: and upon hearing the Plaintiff's Councel, there appeared no Presumption against any of the Defendants, but that the Testament was duly proved in the Ecclesiastical Court: and upon an Appeal was also affirmed before Commissioners Delegates, and Decreed also in *Chancery*. So that it appeared to the Court, that the said Bill was preferred of meer malice to slander the Defendants. Now because the Defendants had no Remedy at Law for the said Slander, and if it should pass unpunished, it may encourage men, It was Resolved by the Court, That by the course of the Court, and according to former Presidents, the Court may give Damages to the Defendants; and so it was done *viz.* 200 *l.* to the Doctor of Divinity, 200 Marks to the Knight, 40 *l.* to the Clerk, 320 *l.* to the Woman. And it was said, that *Creare ex nihilo, quando bonum est, est divinum: sed creare aliquid ex nihilo, quando est malum, est diabolicum: et plus Maledicite nocent quam Benedicite docent.*

Hil.

Hill. 2 Jac. *Regis.* 103.

Theodore Tomlinson brought an Action of account for Goods against one *Philips* in the *Common Pleas*; and thereupon *Philips* sued *Tomlinson* in the Admiralty, supposing the Goods to have been received in Forraign Parts beyond Sea; and *Tomlinson* being committed, for refusing to answer upon his Oath to some Interrogatories, brought his *Habeas Corpus*. Upon which it was resolved by the Court of *Common Pleas*, in three Points, viz.

1. That the Court of Admiralty hath no Cognizance of things done beyond Sea; and this appears plainly by the Statute 13 *R.* 2. *cap.* 5. and the 19 H 6. *fol.* 7.

2. That the Proceedings in the Court of Admiralty, 104.
are according to the Civil Law; and therefore the Court is not of Record, and so cannot assess a Fine, as the Judges of a Court of Record may.

3. It doth appear, that the Interrogatories were of such things, as were within their Jurisdiction, and the Party ought by Law to answer.

This Case was intended by my Lord *Coke*, to be inserted into his 7th Report, but that the King commanded it should not be Printed; but the Judges resolved *ut supra*.

Corven's *Case*, *Right to Seats in the Church.* 104.

Corven did Libel against *Pym* for a Seat in a Church in *D. vonshire*: And *Pym*, by Sergeant *Hutton*, moved for a Prohibition upon this Reason; that himself is seized of a House in the said Parish; and that he and all whose Estates he hath in the House, have had a Seat in an Isle of the Church: And it was Resolved by the Court, that if a Lord of a Manour, or other Person, who hath his House and Land in the Parish, time out of mind, and had a Seat in an Isle of the same Church; so that the Isle

Isle is proper to his Family, and have maintained it at their Charges; that if the Bishop would dispossess him, he shall have a Prohibition: But for a Seat in the Body of the Church, it a Question ariseth, it is to be decided by the Ordinary, because the Freehold is to the Parson, and is common to all the Inhabitants. And it is to be presumed, that the Ordinary who hath Cure of Soules, will take Order in such Cases, according to right and conveniency; and with this agrees 8 H. 7. 12. And the Chief Justice Dame *Wick* her Case, 9 E. 4. 14. which was, The Lady brought a Bill in the *Kings-Bench* against a Parson, *Quare Tunicam suam vocatam, A Coat Armor, and Pennons*, with her Husband Sir *Hugh Wick* his Arms, and a Sword, in a Chappel where he was buried; and the Parson claimed them as Oblations: And it is there holden, That if one were to sit in the Chancel, and hath there a place, his Carper, Livery, and Cushion, the Parson cannot claim them as Oblations, for that they were hanged there in honour of the Deceased: the same Reason of a Coat-Armour, &c. And the Chief Justice said, the Lady might have a good Action, during her Life, in the Case aforesaid; because she caused the things to be set up there; and after her death, the Heir shall have his Action, they being in the nature of Hire-looms which belong to the Heir. And with this agrees the Laws of other Nations, *Bartho. Cassancus, fol.* 13. *Concl.* 29. *Actio dat si aliquis arma in aliquo loco posita deleat aut abrasit, &c.* and in 21 *Ed.* 3. 48. in the Bishop of *Carlisle*'s Case.

105. *Note*, That in *Easter* Term 10 *Jacob.* it was Resolved in the *Star-Chamber*, in the Case between *Huffy*, and *Katharine Leyton*, that if a man have a house in any Parish, and that he, and all those whose Estate he hath, have used to have a certain Pew in the Church; that if the Ordinary will displace him, he shall have a Prohibition; but where there is no such Prescription, the Ordinary shall dispose of common and vulgar Seats.

Earl

Earl of Shrewesbury's *Case*. 105.

Sir *Humphry Winch*, Sir *James Ley*, Sir *Anthony St. Leger*, and Sir *James Hulleſton*, certified the Lords of the Council, by Command from them, by Letters dated 28. *Martii*, 1612. of the Claim of *Gilbert* Earl of *Shrewesbury* to the Earldome of *Waterford*, and Barony of *Dungarvan* in *Ireland*, as followeth.

King *Henry the Sixth*, by Letters-Patents in the 20th. year of his Reign, did Grant to his Coſin, *John* Earl of *Shrewsbury*, in conſideration of his Loyal Services in the City and County of *Waterford*, *&c. ipſum in Comitem Waterford, una cum ſtilo et titulo ac nomine ac honore eiſdem debitis ordinamus & creamus, habendum* to the ſaid Earl, and his Heirs-males of his Body; and further, did Grant the Caſtles, Lordſhips, &c. of *Dungarvan* to the ſaid Earl and the Heirs-males of his Body, To hold, &c. of the King and his Heirs by Homage and Fealty, and by the Service of being his Majeſties *Seneſchal* in *Ireland*. After in the Parliament, called *Des Abſentees*, holden at *Dublin* in *Ireland* 10. *Maii*, 28 H. 8. it was enacted by reaſon of the long abſence of *George*, Earl of *Shrewesbury* out of the ſaid Realm, That the King, his Heirs, &c. ſhall enjoy in right of his Crown of *England*, all Honors, Mannors, Caſtles, &c. and all and ſingular poſſeſſions, &c. as well Spiritual as Temporal, which the ſaid *George* Earl of *Shrewesbury* and *Waterford*, or any other Perſons had to his Uſe, &c. King *Henry* the 8th. by his Letters Patents dated 29th. of his Reign, reciting the ſaid Statute, *Nos præmiſſa conſiderantes, &c.* did Grant to the ſaid Earl and his Heirs the Abbey of *Ruſford* with the Lands thereunto, &c. in the County of *Nottingham*, and the Lordſhip of *Retheram* in the County of *York*, the Abbeys of *Cheſterfield*, *Shirbrook*, and *Gloſſandale* in *Derbyſhire*, with divers other Lands, &c. to be holden

(a) cap. 3.

holden in *Capite*: And the Questions were as followeth.

106. 1. Whether by the long absence of the Earl of *Shrewsbury* out of *Ireland*, the Title of the Honor be lost and forfeited, he being a Peer of both Realms, and residing here in *England*.

2. Whether by the Act *De absentees*, 28 *H.* 8. the Title of Dignity of Earl of *Waterford* be taken from the said Earl as well as the Land, &c.

Afterwards by other Letters Patents dated 27th. of Sept. 1612. the two Chief Justices and Chief Baron were required to consider of the Case, and to certifie their Opinions; which Case being argued by Councel learned in the Law in behalf the said Earl, and they having taken great advisement; It was unanimously *Resolved* by them all as followeth:

1. As to the first, *Resolved*, That since it does not appear what defence was requisite; and that the Consideration Executory was not found by Office to be broken in that Point, he said Earl of *Shrewsbury* notwithstanding does remain Earl of *Waterford*.

2. As to the second, It was *Resolved*, That the said Act 28 H. 8. *De Absentees*, does not onely take away the Possessions given him at his Creation, but also the Dignity it self: for though one may have a Dignity without Possession, yet is it very inconvenient, that Dignity should be cloathed with Poverty: and so it was resolved in the Lord *Ogles* Case, in *Edw.* 6. Reign; as the Baron of *Burleigh* 35 *El.* & did report.

107. The cause of Degradation of *George Nevil* Duke of *Bedford* is worth observation, which was done by Act of Parliament 16 *June*, 17 *Ed.* 4. which Act reciting the making the said *George* Duke, sets forth the cause of his Degradation in these words: *And for so much, as it is openly known, that the said* George *hath not, & by Inheritance may have, any livelyhood to support the said Name, Estate, and Dignity, &c. Wherefore the King, by Advice of his Lords Spirituall*

Spiritual and Temporal, and Commons, &c. Enacteth, &c. That from henceforth the same Creation of the said Duke, and all Names of Dignity given to the said George, *or to* John Nevil *his Father, be void and of none effect.* Wherein are to be observed;

1. That though the Duke had not Possessions to maintain his Dignity, yet it could not be taken from him but by Act of Parliament.

2. Great Inconveniencies follow, where there is great State and Dignity, and no means to maintain it.

3. It is good reason to take away such Dignity by Act of Parliament; and then the Act shall be expounded, to take away such Inconvenience. And though the Earl of *Shrewsbury* be of great Honour, Vertue, and Possessions in *England*; yet it was not the Intention of the Act to continue him Earl in *Ireland*, when his Possessions there were taken away.

And where it was objected, that the general words *Honours* and *Hereditaments*, are explained and qualified by the said Relative subsequent, which the said *George*, or any to his use hath: Now in regard no man can be seized of the said Dignity, therefore the Act doth not extend to it. 'Tis answered, that is to be understood, *Reddendo singula singulis*; and those words which the said *G. E.* hath, are sufficient to pass the Dignity: and with this agrees all the Judges Opinions in *England* in *Nevils* Case upon the like in the Statute 28 H. 8. in 7th Part of my Reports, *fol.* 33, and 34.

Hill. 2 Jacob. *Regis.* *Jurisdiction of the Court of* Common-Pleas. 108.

In the last Term, by the King's Commands, the Justices of the *Kings-Bench*, and Barons of the *Exchequer*, were assembled before the Lord Chancellor *Ellesmere*, at *York*-house, to deliver their Opinion, Whether there was any Authority in our Books, that the Justices of the *Common-*

upon suggestion:

Bench may grant Prohibitions, or whether every Plea ought to be pending in the Court for such cause: And the King would know their Opinions. The Judges took time till this Term; and then *Fleming* Chief Justice, *Tanfield* Chief Baron, *Saig*, *Altham*, *Crook*, *Bromley*, and *Dodderidge*: (*Yelverton* and *Williams* Justices, being dead since last Term) did deliver their Opinions to the Lord Chancellor; That the Presidents of each Court are sufficient Warrant for their Proceedings in the same Court; and for a long time, and in many Successions of Reverend Judges, Prohibitions upon Information, without any other Plea pending, have been granted, Issues tryed, Verdicts and Judgments given upon Demurrer: All which being in force, they unanimously agreed to give no Opinion against the Jurisdiction of the *Common-Bench* in this Case. See my Treatise of the Jurisdiction of the *Common-Bench* in this Point.

108.

Hill. 10 Jac. *Regis*, *Parliament in* Ireland.

The Lords of the Councel did write to the two Chief Justices, and Chief Baron, to look into *Poynings* Act made 10 H. 7. in *Ireland*, and to consider thereof, and certifie what shall be fit to be held concerning the same; their Letter bore date, *ultimo Junii* 1612. Upon which, in this Term, the said Chief Justices, Chief Baron, Attorney and Sollicitor General, were assembled two days at Sergeants Inne: And they considered not onely of the said Act 10 H. 7. c. 4. called *Poynings* Act; but also of an Act made in *Ireland*, 3 & 4 P. & M. c. 4. Entituled, An Act declaring how *Poynings* Act shall be expounded and taken; for by the said Act 10 H. 7. it is provided, That no Parliament be hereafter holden in *Ireland*, but when the Kings Lieutenant and Councell there first certifie the King, under the Great Seal of that Land, the causes, &c. and such causes, &c. affirmed by the King and his Councel, to be good and expedient for the Land, and his Licence thereupon, &c. A Parliament to be holden after the

the former before, &c. And any Parliament holden contrary &c. to be void in Law. Upon which Act, divers Doubts were conceived.

1. And first, Whether the said Act 10 H. 7. does extend to the Successors of H. 7. the Act speaking onely of the King generally, and not his Successors. (109).

2. If the Queen *Mary* were within the word *King*, and both were held affirmatively: for the word *King* being spoke indefinitely, does extend in Law to all his Successors: And this is so expounded by the Act 3 and 4 P. and *M. viz.* That the said Act 10 H. 7. shall extend to the King and Queens Majesty, her Heirs and Successors. Secondly, where *Poynings* Act sayes the Kings Lieutenant and Councel, the said Act 3 and 4 P. and *M.* explains it to extend to all other Officers the King shall Depute, by what Name soever.

3. The greatest Doubt was upon these words of *Poynings* Act: *And such Causes, Considerations, and Acts, affirmed by the King and his Council, to be good and expedient for the Land, &c.* Whether the King may make any change or alteration of the Causes, &c. which shall be transmitted hither from the Lieutenant and Councel of *Ireland*: for that it is not affirmation, but correction and alteration of them: and therefore it was necessary to explain, that the Act 3 and 4 P. and *M.* was in these words; *Either for the passing of the said Acts, and in such form and tenor as they should be sent into* England; *or else for the change or alteration of them, or any part of them.*

4. Another Doubt arose from these words; *That done, a Parliament to be had:* If at the same Parl. other Acts, which have been affirmed or altered here, may be Enacted there, which is explained by the said last Act in these words, *viz. For passing and agreeing upon such Acts, and no others, as shall be returned, &c.*

5. A fifth Doubt arose from the same words; Whether the Lieutenant and Councel of *Ireland*, after the Parliament begun, and *pendente Parliamento*, may upon (110).

debate there transmit any other Considerations, &c. the which said Act 3 and 4 P. and M. is by expreſs words explained, they may.

And it was unanimouſly Reſolved, That the Cauſes, Conſiderations, and Acts, tranſmitted hither under the Great Seal of *Ireland*, ought to be kept in the *Chancery* in *England*, and not be remanded.

2. If they be affirmed, they muſt be tranſcribed under the Great Seal, and ſo returned into *Ireland*.

3. If the Acts tranſmitted hither be in any part altered or changed here, the Act ſo altered muſt forthwith be returned under the Great Seal of *England*, for the Tranſcript under the *Iriſh* Great Seal, to remain in *Chancery* here ſhall not be amended; but the Amendment ſhall be under the *Engliſh* Great Seal. See 10 H. 6. 8. which begins, *Mich.* 18 H. 6. *Rot.* 46. *coram Rege*: how a Parliament was holden there before *Poynings* Act. See alſo another Act made in *Ireland* the ſame 10 H. 7. c. 22. *vide* 2 R. 3. 12. *Hibernia habet Parliamenta & faciunt leges & noſtra ſtatuta non ligant eos, quia non mittunt milites ad Parliamentum: ſed perſonæ eorum ſunt ſubjecti Regis, ſicut inhabitantes* Calinæ, Gaſcogniæ, & Guienæ.

III. But queſtion is made of this in ſome of our Books; *vid.* 20 H. 6. 8. 32 H. 6. 25. 1 H. 7. 3. 3 H. 7. 10. 8 R. 2. *Proceſs* 284. 13 *Ed.* 2. *Tit. Baſtard*. 11 H. 4. 7. 7 *Ed.* 4. 27. *Plow. Comment.* 368. 13 *Eliz. Dyer* 303. 2 *Eliz. Dyer* 366. *Calvins* Caſe, 7th of my *Reports* 22 b. 14 *Ed.* 3. 184. A Prebend in *England*, made Biſhop of *Dublin* in *Ireland*, his Prebendary is void. See the Statute of *Ireland*, &c. That the Acts of Parliament made in *England*, ſince the 10 H. 7. do not bind them in *Ireland*; but all made in *England* before the 10 H. 7. by the Act made in *Ireland*, 10 H. 7. c. 22. do bind them in *Ireland*.

III. *Note*, *Cambden* King at Arms told me, that ſome held, if a Baron dyes, having Iſſue divers Daughters, the King may confer the Dignity to him who marryes any of them, as hath been done in divers Caſes, *viz.* In the caſe of the Lord

Lord *Cromwel*, who had Iſſue divers Daughters: And the King did confer the Dignity upon *Burchier*, who marryed the youngeſt Daughter, and he was called *Cromwel*; and ſo in other Caſes.

Note, (by *Linwood*) it appears by the Canons Eccleſiaſtick, none may exerciſe Eccleſiaſtick Juriſdiction, unleſs he be within the Orders of the Church; becauſe none may pronounce Excommunication, but a Spiritual Perſon: But now by the 37 H. 8. c. 17. a Doctor of Law or Regiſter, though a Lay-man, may execute Eccleſiaſtical Juriſdiction. 111.

No Eccleſiaſtical Judge may cite a Church-Warden to the Court, but ſo as he may return home the ſame day. Alſo the Canons limit how many Courts, *Ex Officio*, they may have in a year.

Mich. 11 Jac. Regis. 112.

Note, If a man give to one of his Children a certain ſum in his life, and after dyes; though this is not given as a Childs full Portion, yet it ſhall be ſufficient for him: But if the Father by Writing declare, that it is but part of a Childs portion, then he ſhall have a full Childs part, other wiſe not.

Note, It was holden by the Judges in the *Kings-Bench*, That if a man be poſſeſſed of a Houſe and Term for years, doth deviſe for years, does demiſe this to his Wife for Life, the remainder over and dyes, all his Debts being paid; If the Widow enters generally, and converts the profits to her own uſe, and not to pious Works, this is a Determination of her Election. And this is the general caſe; and therefore it is good that it be ſpecially found.

112. *Hayn's* Case.

In the Lent Assize holden at *Leicester*, 11 and 12 *Jac.* the Case was, One *William Haynes* had digged up the several Graves of three men and one Woman in the Night, and had taken their Winding-Sheets from their Bodies, and buryed them again: And it was *Resolved* by the Justices at *Sergeants* Inne in *Fleetstreet*, that the property of the Sheets remains in the Owners, that is, of him that had the property therein, when the dead body was wrapped therewith; as in 11 H. 4. If Apparel be put upon a Boy, this is a Gift in Law, for the Boy hath Capacity to take it; but a dead Body, being but a Lump of Earth, hath no capacity: Also, it is not a Gift to the Person, but bestowed on the Body, for the Reverence towards it, to express the hope of Resurrection. And therefore at the second Assizes he was severally Indicted for taking these Sheets: The first Indictment was of Petty-Larceny, for which he was whipped: And at the same Assizes he was Indicted for the Felonious taking the other three Sheets, for which he had his Clergy, and escaped Death.

113. *Hill.* 11 *Jacobi Regis.* Earl of *Derby's* Case.

In *Chancery* between Sir *John Egerton* Plaintiff, and *William* Earl of *Derby*, Chamberlain of *Chester*, and others, Defendants; It was Resolved by the Lord Chancellor, the Chief Justice of *England*, the Master of the Rolls, *Doddridge* and *Winch* Justices,

1. That the Chamberlain of *Chester*, being sole Judge of Equity, cannot Decree any thing wherein himself is party: but in such Case, the Suit shall be heard here in *Chancery, coram Domino Rege.*

2. If

2. If the Defendants dwell out of the County Palatine, he who hath to complain in Equity, may complain here in *Chancery:* And therefore the Suit shall be here in *Chancery, Ne Curia Domini Regis deficient in justitia exhibenda:* Else the Subject shall have good Right, and yet have no Remedy. And this pursues the Reason of the Common-Law, 13 *Ed.* 3. *Tit. Jurisdiction,* 8 *Ed.* 2. *Aff.* 382. 5 *Ed.* 3. 30. 30 *H.* 6. 6. 7 *H.* 6. 37. For where the particular Courts cannot do Justice to the Parties, they shall sue in the Kings general Courts at *Westminster,* 11 H. 4. 27. 8 *Ed.* 4. 8.

3. It was Resolved, That the King cannot grant a Commission to any to determine any matter of Equity, but it ought to be determined in *Chancery,* which hath had Jurisdiction in such case time out of mind, and had allowance by Law: whereas such new Commissions have been resolved to be against Law, as was agreed in *Pott's* Case.

4. Upon Consideration of the Lord *Dyer,* and other Justices in Queen *Elizabeth's* time, concerning the Jurisdiction of the County Palatine; It was Resolved, That for things Transitory, though in truth they be in the County Palatine, the Plaintiff may alleadge them to be done in any place of *England,* and the Defendant may not plead to the Jurisdiction of the Court, See *Dyer,* 13 *Eliz. fol.* 202, 716.

Forms and Orders of Parliament. 114.

In the House of Commons, when the Speaker is chosen, he in his place where he shall first sit down, shall disable himself, and pray them to proceed a new Election: But after he is put into the Chair, then he shall pray them that he may disable himself to the King.

Note, The King, the first day of the Parliament, shall sit in the Upper-House; and there the King, or Chancellor

cellor by his Command, shall shew the Causes of Calling the Parliament; and in Conclusion of the Oration, the Commons are commanded to chuse a Speaker; which after 2 or 3 dayes they present, where He makes an Oration, disabling himself, &c.

In the Lower House when a Bill is read, the Speaker opens the parts of it, so that each Member may understand the intent thereof; and the like is done by the Lord Chancellor in the Upper House: Then upon the second Reading, sometimes it is Engrossed without Commitment: Then it is put to the Question; and so in the Upper House: But neither in the Upper or Lower House, the Chancellor or Speaker, shall not repeat a Bill, or an Amendment but once.

When a Bill is committed to the second Reading, then if Committees do amend it in any Point, they shall write their Amendments in a Paper, and shall direct to a Line; and what Words shall be interlined, and where; and then all shall be ingrossed in a Bill.

115. And if a Bill pass the Commons House, and the Lords amend it, they do as before shew the Line, &c. and after the Amendments are ingrossed, with particular References, and the Bill sent down to the Commons, the Amendments are read three times; and so *e converso*, of a Bill passing the Upper House.

No Lord, Knight, Citizen, or Burgess, may speak above once to one Bill in one day.

No private Bill ought to be read before publike Bills.

In the Commons House, those that are for the New Bill (if there be a Question of Voyces) shall go out of the House; and who are against the Bill, or for the Common-Law, or any former, shall sit still, for they are in possession of the Old Law.

In the Upper House, two Lords are appointed to number the Voyces.

In

In both Houses, he that stands up first to speak, shall speak first without difference of Persons.

When a Bill is ingrossed at the third Reading, it may be amended in the same House in matter of substance, *a fortiori*, the Errour of the Clerk in the ingrossing may be amended, &c.

Pasch. 12 Jac. *Regis.* Walter Chute's *Case.* 115.

Walter Chute Sewer to the King, exhibited a Petition to the King, That for safety of the Realm, &c. that he would erect a new Office to Register all Strangers within the Realm, except Merchant-Strangers, to be kept at *London*, and to grant it to the Petitioner, with a Fee, or without. And all Strangers, except Merchant-strangers, to depart the Realm in a certain time, unless they take a Billet under the said Registers Hand. Which Petition, the Lords of the Councel referred to Me, by their Letters of the 13 *Novemb.* 1613. to consider what the Law is in that behalf, &c. And upon Conference with the Justices of the Common-Pleas, and other Justices and Barons at Sergeants Inne in *Fleetstreet*, It was *Resolved*,

That the Erection of such New Offices, for the benefit of a private man, was against all Law, of what nature soever: Therefore when one Captain *Lee* made suit to the King, to have an Office to inventory the Goods of those that dyed Testate or Intestate, It was Resolved by my Lord Chancellor, and my Self, That such Grant shall be utterly void, being both against the Common-Law, and the Statute 21 H. 8. c. 5. In like manner, when another sued to have the Registring of Birth-dayes, and the time of death, &c. So *Mich.* 19 *Jac.* To make a New Office in the *Kings-Bench* onely for making *Lattitats*, was resolved void. So *Littletons* Suit, to name an Officer to be a Gen. Reg. &c. But the Suit was rejected (notwithstanding

ing the fair Pretences of it) by the two Chief Justices, and others: See *Hill.* 12 *Jac. Regis.*

116. 2. Secondly, It was *Resolved*, That it was inconvenient for divers Causes; 1. For a private man to have private ends. 2. The numbring of Strangers by a private man, would infer a Terrour, and other Kings and Princes will take offence at it. 3. It is to be considered, what breach it will be to former Treaties.

3. As to the third, It may be performed without any Inconvenience; and so it was divided by the Lord *Burleigh*, and other Lords of the Councel, 37 *Eliz.* To write Letters to the Mayors, Bayliffs, &c. of every City, Borough, &c. where any strangers are resident, to certifie how many, and of what quality, &c. which they are to know, in respect of their Inhabitants, &c. and this may be done without any Writing; which being shewn to the Lords, was by them well approved, and the Suits utterly disallowed.

Decemb. 3. *Anno* 3 H. 8. Commission was granted to divers, to certifie the number of Strangers, Artificers, &c. within *London* and Suburbs, according to the Statutes. See *Candish* Case, 29 *Eliz.*

13 *Eliz.* A Grant of an Office to *Thomas Knivet*, to examine his Majesties Auditors, and Clerks of the Pipe, &c. *Resolved* by the Court to be against Law, for it belongs to the Barons who are Judges, 25 *Eliz.* A Grant of an Office to *Thomas Lichfield*, to examine all Deceits, &c. of the Queens Officers for 8 years; *Resolved* to be void.

Sub-pœna's in *Chancery*, belonged anciently to the Six Clerks; Queen *Elizabeth* granted the same to a particular man.

117. *Affidavits* Filing and keeping, belonged to the Register; King *James* granted them to a particular man: So the erecting and putting down Innes did belong to the Justice of Peace; the same King granted it to a particular man: So likewise the taking of Depositions, &c.

The

The Office of *Alneger*, granted by the King to *Simon Darlington*, and the Fees limited. The Drawing, Ingrossing, and Writing all Licences, and Pardons, granted to *Edward Bacon*, with former Fees, and a Restraint to all others. The Spa Office granted to *Thomas George*, and others during life, with the Fee of 2 *s.* and a restraint to others. The Office of making and Registring all manner of Assurances and Policies, &c. granted to *Richard Gandler*, Gent. with such Fees, as the Lord Mayor and others should rate, and a Restraint to others, &c. The Office of writing Tallies, and Counter-Tallies, granted to Sir *Vincent Skinner*. The Office of ingrossing Patents to the Great Seal, with encrease of Fees, granted to Sir *Richard Young*, and Mr. *Pye*. *Sed de hoc quære.*

Sir Stephen Proctor's *Case*. 117.

In an Information in the *Star-Chamber*, against *Stephen Proctor*, *Berkenhead*, and others, for Scandall and Conspiracy against the Earl of *Northampton*, and the Lord *Wooton*; At the Hearing of the Case, were present eight Lords, *viz.* the Chief Baron, the two Chief Justices, two Bishops, one Baron, Chancellor of the *Exchequer*, and the Lord Chancellor: And the three Chief Justices, and the Temporal Baron, condemned Sir *Stephen Proctor*, and fined and imprisoned him: But the Lord Chancellor, the two Bishops, and the Chancellor of the *Exchequer*, acquitted him. And the Question was, if Sir *Stephen Proctor* shall be condemned or acquitted: And the matter was referred to the two Chief Justices, calling to their assistance the Kings Learned Councel.

And first they *Resolved*, That this Question must be determined by the Presidents of the Court of *Star-Chamber*, that Court being against the Rule and Order of all Courts: For in all other Courts, if the Justices are equally divided, no Judgment can be given: So also is it in

in the Parliament; and therefore this course must be warranted by the Custom of the Court. And as to that, two Presidents onely were produced, *viz.* One in *Hillary* Term, 39 *Eliz.* *Gibbon* Plaintiff, and *Griffith* and others Defendants, for a Ryot; where at Hearing, 8 being present, 4 gave Judgment, that the Defendants were guilty, and 4 *e contra*, and no Sentence of Condemnation was ever entred, because the Lord Chancellor was one of the 4 that acquitted them. The other was in *Hillary* 45 *Eliz.* in an Information against *Katherine* and others, for Forging a Will, &c. where 4 finding the Defendants guilty of Forgery, and 4 onely of Misdemeanour, whereof the Lord Chancellor was one, Sentence was entred according to the Chancellors Voyce; and no other President could be found in this Case, as I reported this Term.

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118. *Concerning Benevolence.*

Note, The Exaction under the good Name of *Benevolence* began thus: When King *Edw.* the 4th had a Subsidy granted him by Parl. in the 12th year of his Reign: because he could have no more by Parl. and with a Parl. he could not have a Subsidy, he invented this Devise; wherein observe 3 Things:

1. The Cause. 2. The Invention. 3. The Success.

1. The Duke of *Burgundy*, who marryed *Edw.* the 4th Sister, sollicited the King to joyn in War with him against the *French* King: whereto he easily consented, to be revenged of him for aiding the Earl of *Warwick*, &c. And this was the cause.

2. The Invention was; The King called before him several times many of his wealthiest Subjects, to declare to them his Necessity and Purpose to levy War, and demanded of each of them a Sum of Money; which by the King's extraordinary courtesie to them, they very freely yielded

yielded to. *Amongst the rest, there was a Rich Widow, of whom the King merrily asked what she would give him for maintenance of his Wars: Ty my Faith* (quoth she) *for your lovely Countenance sake, you shall have* 20 l. *which being more than the King expected, he thanked her, and vouchsafed to kiss her. Upon which, she presently swore, he should have* 20 l. *more.*

3. The *Success* was, That where the King called this a *Benevolence*, yet many of the People did much grudge at it, and called it a *Malevolence*.

Primo Ed. 5. The Duke of *Buckingham* in *Guild-Hall*, *London*, among other Things, inveighed in his Speech against this Taxation; and 1 *R.* 3. *c.* 2. a Statute is made against it. 119.

6 H. 7. The King declaring in Parl. that he had just cause of War against the *French* King, desired a *Benevolence*, according to the Example of *Edw.* 4. and published, That he would by their open Hands, measure their Benevolent Hearts. By this means he collected great Sums of Money, but with some grudge, 11 H. 7. *ca.* 10. An Act was made for levying that *Benevolence*. 20 H. 7. A Commission to levy what was granted, 11 H. 7.

15 H. 8. A Commission under the Great Seal, called *A Commission of Anticipation*. 16 H. 8. For Warre with *France*, a *Benevolence* levyed, with great Curses against the Councel; for it was for a sixth part of the value in Money or Plate, against the Subjects good-will. 26 H. 8. Another *Benevolence* levyed by Commission against the Subjects Will: But if the Subjects will of their free Will give the King any Moneys, this is not prohibited by any Statute: This is proved by the 11 H. 7. *c.* 10.

Feb. Anno 40 *Eliz.* Resolved by all the Justices and Barons, That a free Grant to the Queen, without coertion, is lawful, and accordingly they granted the Queen. *Quod nota bene; Quia, &c.*

Pasch.

120. Pasch. 12 *Jac.* Regis.

The Case of *Dungannon* in *Ireland*, being a New Corporation, was thus: The King Constituted the Town of *Dungannon* to be a Free Borough; *Et ulterius volumus, &c. quod Inhabitantes Villæ prædictæ sint unum corpus corporatum per nomen Præpositi, 12 Burgensium & Communitatis* Dungannon, *&c. Et quod ipsi prædicti Præpositi & Burgenses & successores sui habeant potestatem eligendi duos Burgenses &c. ad Parl. &c.* And the Doubt was, If this Grant of Election of Burgesses of Parliament were good, because it was granted but to parcel of the body, *viz.* the Provost and Burgesses, and not to the Commonalty. And the Chief Baron thought this being but a Nomination, it was sufficient to make the Provost and Burgesses onely to have it; but this was denyed by all Justices and Barons: For the power to Elect Burgesses, is an Inheritance which the Provost and Burgesses are not capable of, and ought to be vested in the entire Corporation. And so it was Resolved by all, That such a Grant made by the King should be void; for the Inhabitants have not Capacity to take an Inheritance; as in 15 *E.* 4. to have Common. And *Littleton* saith in his Chapter of *Burroughs*, That the Burroughs which send Burgesses to Parliament, were the most antient and chief Cities, &c. So that it shall be intended, that at first they were incorporate. Also, *Plus valet sæpenumero vulgi consuetudo, quam regalis concessio.*

But it was Resolved, by *Hobart*, *Trefield*, *Altham*, *Wich*, *Nicols*, and *Haughton*, that *Quod Volumus* was a good word of Grant, as *Pigot* was of Opinion, 21. *Edw.* 4. and this shall be implyed a Grant to all the Corporation, that the Provost and Burgesses shall Elect, &c. And regularly, when the Grant is indefinite, *viz.* First, *Concedimus*, an incertain thing, *& ulterius volumus quod Præ-*

Præpositus & Burgenses & Successores sui eligerint. This shall be within the first *Concedimus* to all the Body. But the Chief Justice of *England* and *Dodderidge* thought the contrary.

Note, All the New Corporations were of the same Form, and in none of them is any Clause to Elect New Burgesses; so that when the modern Burgesses dye, the power to Elect Burgesses is gone.

Mich. 12 *Jacobi Regis.* 121.

A Question was moved to the Chief Baron and Justices of *Sergeants* Inn in *Chancery*-Lane; That if a Felon be convict, either by Verdict or Confession, if immediatly by his Conviction his Goods and Chattels be forfeited: And it was said, That if the Felon, after Conviction, pray his Clergy, he then shall clearly forfeit his Goods and Chattels; for *Quadam modo*, this is a Flight; because refusing the Common-Law, he flyes to Priviledge of Holy Church. But it was *Resolved* by the chief Baron and Justices, That immediatly by his Conviction, his Goods and Chattels are forfeited, and the praying of his Clergy is not any Forfeiture: and with this agrees *Stamf. fol.* 192. *a.* and also 1 *R.* 3. And of the same Opinion was the Chief Justice and Justices of *Sergeants* Inne in *Fleetstreet*. *Vid. Trin.* 41 *Eliz.* 332.

Mich. 12 Jacobi Regis. *Anne Hungate's* Case, in *Cam. Stell.* 121.

In this Term a great Case was heard and determined in the *Star-Chamber*, between Sir *Henry Day*, (who dyed pendent the Bill) and *Anne* his Wife, and *Nicholas Bedingfield* Esq; and *Elizabeth* his Wife, Plaintiffs: And *Anne Hungate* Widow, Sir *Robert Winde*, *Henry Branthwait* Esq;

Esq; *Thomas Townesend* Esq; *Thomas Blomfield* Gent. and *George Min* Gent. Defendants. The Case was thus: *Henry Hoogan* Esq; being seized of the Manor of *Hamonds*, and of divers Lands of *East-Bradenham*, &c. in *Norfolk* in Fee; by Deed enfeoffed them in the use of the said *Anne*, who took *Hungate* to Husband, and had Issue by him a Son and a Daughter, and he dyed. *Anne* obtained the Wardship of the Son; and after, when the Son was of the Age of 21 years, wanting onely 6 Weeks, by *Dedimus potestatem*, directed to Sir *Robert Wiade*, *Henry Braithwayt* then Feodary, and *Thomas Townesend*, they took Cognizance of a Fine of the said Son, being of the Age aforesaid, and sick: And the Bill charged them all with Practice, in procuring the said Son to acknowledge the said Fine, they knowing him under Age, and in Wardship as aforesaid; but there was no practice used by any of the Defendants, but the Son of his own good-will levyed it: And by Indenture, the use was limited to his Mother the said *Anne* and her Heirs, with power of Revocation by the Son, upon tender of 10 *s.* And this was in consideration, that the Mother had paid the Debts of his Father, which were very great, and had obtained the Wardship of him, and to confirm her Joynture: And that his Mother, if she pleased, might give it to his Brother, by *Hungate*, who was but of half-bloud. And it appeared, the Mother knew the Son to be within Age, but the Commissionars were ignorant of it; nor did they send for the Church-Book, in which his Age did appear, being in the same Parish. And the Plaintiffs Councel prayed, that the Defendants should be punished for their Misdemeanour; And that the Women Plaintiffs, who were Cosins, &c. Heirs to the said Son of the entire bloud, should be dis-inherited by the said Fine.

122. To which it was Resolved, by the two Chief Justices, and chief Baron, That there was not any Crime punishable by the Law in this Case; for the Judges of the Law, and of this Court, may punish Offences, &c. but they

they cannot create Offences: nor do as *Hannibal* did, to make his Way over the *Alps*, when he could find none: for *Judicandum enim legibus, & ubi non est lex ibi nec est transgressio:* And therefore if a Fine levyed by an Infant, be not Reversed during his Minority, 'tis unavoidable in Law, because the Infants Age is to be try'd, *Non testimonio, non juratorum vendicto, sed Judicis inspectione solummodo.* F. N. B. *fol.* 21. And for this it was Resolved by the said Justices, That forasmuch as no Corruption and Circumvention was proved in any of the Parties, of which they may be Indicted at the Suit of the King, or punished in this Court, that the Fine shall stand: And it was not apparent to the Commissioners he was within Age, seeing he wanted but six Weeks; but if they had known it, it had been a Misdemeanour in them.

And for this, in this Court, *Mich.* 24. & 25 *Eliz.* 15. Between *William Cavendish*, and *Anne* his Wife, one of the Co-Heirs of *Henry Knevet*, against *Robert Wortley*, and *Katharine*, another Co-Heir, and *Trafford*, and others, Defendants; The Case was, That *Robert Wortley*, and *Katharine* his Wife, being within Age, acknowledged a Note of a Fine, before *Trafford* and another of the Defendants, by *Dedimus Potestatem*; And by the *Decree*, the Commissioners knew *Katharine* was within Age; and therefore every one of them was Fined, but the Fine stands.

Mich. 38 and 39 *Eliz.* In this Court one *Alexander* 123.
Gilderbrand seized of Lands in *Wisbam*, in the County of *Norfolk*, in Fee: one *Hubbard* procured one *Roger* to take upon him the Name of *Alexander Gilderbrand*, who was then beyond Sea, to acknowledge a Fine to the said *Hubbard*, of the said Lands, and they were Fined in this Court, and the Lands ordered to be re-assured to *Alexander*, on pain of a greater Fine: But the Fine was not drawn off the File, nor Damages awarded to the party grieved.

123. Mich. 12 *Jac.* Regis. *Mansfield's* Case.

23 *Eliz.* In the Court of Wards the Case was this: *Henry Bushly* seized in Fee of Lands in *Northmims*, in the County of *Hartford*, by his Will in writing, demised the said Lands to *Henry Bushly* his Son in Tail, the remainder to *William Bushly*. And because his Son was within Age, he demised the Education of him to *Thomas Harrison*, whom he made his Executor. Afterward it happned, that *Henry* the Son became a deformed Cripple, and proved an Ideot, *a Nativitate*: which Ideot, by the practice of *Nichols*, and others, was ravished from his Guardian, and carryed upon mens shoulders to an unknown place, and there kept in secret, till he had acknowledged a Fine of his Lands to one *Bothome*, before Justice *Southcot*, 9 *Eliz.* and by Indenture, the use of the Fine was declared to be to the use of the Cognizee and his Heirs: which *Bothome* 12 *Eliz.* conveyed the said Land to one *Henry Mansfield*. And 22 *Eliz.* the said *Henry Bushly* the Son, was by Inquisition found an Ideot, *a Nativitate*: And upon this, 33 *Eliz.* the Court of Wards took order for possession of the Lands. And it was moved, That though the Fine binds the Ideot; yet the Indentures are not sufficient to direct the Uses. But it was Resolved, That forasmuch as he was enabled by the Fine as to the Principle, he shall not be disabled to limit the Uses, which are but as accessory: The same is the Law of an Infant, and a Feme-Court. And the said *Mansfield* brought an Action of Trespass in the *Common-Pleas* against one *Trott*, Farmer of the said Lands, and the Issue was tryed at the Bar; and the Deformed Ideot brought out of the Court of Wards, to be shewn to the Judges of the Common-Pleas, and to the Jurors: And the Judges hearing that *Mansfields* Title was under the Fine levyed by that Ideot, the Lord *Dyer* and Court caused a Juror, by consent, to be withdrawn; and

and the Lord *Dyer* said, That the Judge who took the Fine was never worthy to take another: yet notwithstanding, all the Fine stood good.

Mich. 12 Jac. Regis. *Warcombe* and *Carrel's* Case. *12A.*

20 *Octob.* 6 *Eliz.* In the *Star Chamber* the Case was, *Edward Carrel* an Apprentice of the Law, for a great sum of money bought the Wardship of *Joan*, the Daughter and Heir of *Warcomb*, in the County of *Hereford*, and married her to *Edw. Carrel* his youngest Son: And after *Hill.* 5 *Eliz.* the said *Joan* fell sick; and being of the Age of 19 years, and having no Issue, *Edward* her Husband perswaded her, to acknowledge a Fine of her Inheritance, by which should be conveyed an Estate to the Husband and Wife in Tail, the remainder to the right Heirs of the Wife; and Cognizance was taken by *Ded. Potest.* directed to Sir *Thomas Sanders*, and one *Chenel* of *Grays Inne* before *Easter*, divers Judges being here who might have examined her, and on *Friday* in *Easter* Week she dyed; but the Fine, *& l'argent du Roigne*, was entred, as of the last Term, *viz. Hilary* Term 4 days before the Wives death. The Original Writ of Covenant bore Test 15 *Jan. vet. Craftin. Pur.* and the *Ded. Potest.* 18 *Jan.* And *James Warcombe*, Cosin and Heir of *Joan*, complained by Bill against *Edw. Carrel*, for getting the said Fine by indirect Practices; and thereupon the Sentence of the Court was as followeth:

This day a right honourable Assembly being in this Court, the matter depending in the same, between James Warcombe *Esq;* Plaintiff, *and* Edw. Carrel *of* London *Gent.* Defendant, *as well concerning the validity of a Fine, levyed by the said* Edward, *and* Joan *his wife: which* Joan, *as the* Plaintiff *alledges, was under age at the time of the Fine levyed; and also of certain undue means committed by the said* Edw.

Carrel, *in the ſuing out and getting the ſaid Fine; and upon hearing all that could be alleadged on both parts, the ſaid Fine was by the Opinion of the whole Court, adjudged good and effectual in Law. And alſo no fault judged to be in the ſaid* Edward Carrel, *in ſuing out the ſaid Fine; but that the ſame was ſued out in due form and order of the Laws of this Realm: and this is within the Rule,* Facta tenent multa quæ fieri prohibentur.

And as *Carrel* was not puniſhed, though he knew his Wife within Age; ſo nor *Hungate* ſhall be puniſhed, though ſhe knew her Son ſo; and the rather, by reaſon of that antient Verſe,

Leges Communes ſi neſcit Fœmina, ſiles,
Clericus et Cultor, Judex ſibi parcet et ultor.

And by Sentence all were diſmiſſed, &c.

125. Among the Records in the Treaſury, *Inter placita & e. de Term. Sanct.* Mich. 42 Ed. 3. Rot. 27.

Cornubia. Helena *filia* Hugonis Allot, brought an Appeal of Robbery againſt *Lawrence* Boskoſleak, *Rich.* Coharta, *Jo. Gilmin,* and *Joan* his Wife, and others; and the Defendants plead not guilty, and were found not guilty, *Nec unquam ſe ſubtraxerunt Ideo præceptum* Laurentius, *& omnes alii, &c. cant inde quieti. Et prædicta* Elena *pro falſo appello ſua committitur, &c. et ſuper hoc præd.* Laurentius *& alii petunt juxta formam Stat. quod Juratores inquirant quæ damna, &c. Et ſuper hoc quæſitum eſt à præfatis Juratoribus, &c. Qui dicunt quod præd.* Laurentius *ſuſtinuit ad valentiam* 10 l. *&c. et ſic ſingulatim de cæteris &c. dicunt etiam quod* Helena *præd. non eſt ſufficiens, &c. et quod* Johannes Riddel *ſen. &* Jo. Riddel *jun. &c. abbtaverunt præd.* Helenam, *ideo ipſi &c.* Out of which Record, theſe things are to be obſerved:

1. Though it is Enacted by the Stat. *Weſt. 2. cap.* 12. That in this Caſe *Juſticiarii, &c. puniant appellatorem per priſonam unius Anni, &c.* ſo that they were not Bailable: yet *quia eadem* Helena *prægnans fuit & in periculo mortis,* ſhe was let to Bayl, to have her Body 15 *Mich. ad ſa-*

satisfaciendum prædicto Laurentio *et aliis, &c.* And the Reason of this is, because the Common-Law requires in every Case conveniency; and it is inconvenient a Woman with Child should remain in Common-Gaol: And the Judges of the Common-Law ought to know what the Moral Poet spoke, *Reddere personæ sit convenientia cuiq;* and agrees with Advice of *Bractoa, lib. 2. cap. 2.*

2. That the Defendants recover their Damages, either wholly against the Principle, or wholly against the Abettors: and with this agrees *Ed. 4. 3.* 126.

3. Though the Statute saith, *Restituant Appellatores damna, &c.* yet the Damages shall be *singulatim* assessed; for as the Defamation of one may be greater than another; so the Damages of one may be greater than another.

4. Though the Appellor be not sufficient to pay; yet his body shall be taken *ad satisfaciendum, Quia qui non habet in ære, luat in corpore.*

5. Though the Jurors in the Appeal, have found the Defendants Abettors; yet insomuch as they are strangers to the Original, they shal not be concluded, *Quia res inter alios actæ alteri nocere non debent.*

Vide the Book of Entries, *Title* Appeal *Divisione Damages,* 1 & 2. *Vide Placita coram rege apud* Ebor. *in Crast. Sancti* Trin. 7 Ed. 3. 44. *Divisione.* Indictments are very well worth observing.

Duresse per Gaoler. 127.

See there divers sorts of Presentments; as of *Wellingover, John Alnner, Thomas Ballivus de Flaxwel & Laughton, Thomas de Mandon Ballivus de Boby* of *Grafton, Thomas Carleton* Under-Sheriff of the County of *Lincoln,* and *Hugo de Baxter,* &c.

127 *False Affidavits.*

In an Action *sur le case*, it was Resolved, *per totam Curiam*, That if a Sumner return one certified upon his Oath in Court-Christian, where in truth he was not, and thereon he is pronounced *contumax*, and so becometh excommunicate, he shall have his Action *sur le case*; for here is *damnum et injuria*.

128. And it was Resolved, That Perjury, by which Damages do accrew, may be punished as a Misdemeanour, at the Suit of the King; and also the Party may have his Action upon the Case; for Perjury may not be committed with Impunity: And for that Reason, If Jurors themselves use Perjury, an Attaint lyes by the Common-Law; as appears by *Glanvil. lib. 2. cap. 29.* 15 H. 8. Title *Attaint*, 75. 6 H. 3. *ibid.* 73 & 75. and in the time of *Ed. 1. Attaint.* 70. *West. 1. cap. 38.* *Vide* F. N. B. 109. *Vid.* 27 H. 6. 25.

In like manner it was agreed, That if one make a false *Affidavit* by which the Party is Arrested with Process of Contempt, he may have an Action *sur le case*, and recover Damages: And though the Court-Christian may punish, *pro salute animæ*; yet they cannot award Damages to the party. And though the matter be meerly Ecclesiastical; yet if the Party grieved hath Damages, either by wrongful Proceedings of the Judge, or Misfeasans, or Nonfeasans, or falsity of any Minister, &c. the Party grieved may have an Action *sur le case*, and recover Damages.

Doctor and *Stud.* 118, 119. *Action sur le Case*, lyes against the Ordinary, for a wrongful Excommunication, touching any thing out of his Jurisdiction, &c. So in *Fitz.* 47 H. 6. 8. If an Arch-Deacon refuse to induct the Clerk, &c. he shall have *Action sur le case*: Which was affirmed for good Law by all the Court: with which agrees

agrees 26 H. 8. 3. *a.* If a man proceed against a Prohibition, the Party may have an Action upon the Case against him, for prosecuting in Court-Christian. *Vid. Trin.* 20 *Ed.* 3. *Rot.* 46. in the Treasury, *Richard Trefil's* Case. So the like, *Pasch.* 13 *Ed.* 3. *Rot.* 78. *Philip de Hardesshals* Case. *Hill.* 32 *E.* 3. *Rot.* 78. and *Trin.* 37 *Ed.* 1. and *Mich.* 29 *Ed.* 3. *Rot.* 19. *similiter*: and divers other Records you may have. See in my Book of *Presidents.*

Pasch. 14 *Jac.* Regis. 129.

An *Habeas Corpus* to the Marshal of the Admiralty, granted in *Hillary* Term last past for *Haukridge*, Prisoner in the custody of the said Marshal, who did return, *Quædam causa spolii, &c. contra* Haukridge *pendet indecisa per judicio & sententia paratus, &c. Qui quidem* Will: Haukridge *remanet donec antedict. causa per præfat.* Daniel Dun *fuerit & hoc est causa.* And also upon another *Habeas Corpus*, he made such a Return; and otherwise, *Parata sit*, &c. Which the Court took to be very insufficient, and gave divers days to amend the Return, and to shew the cause of Delay, and why Sentence was not given; and the Marshal would not amend his Return. Upon which, the Party being in Prison 16 or 18 Weekes, always the Return was *est parata*, &c. And after in another Writ returnable, *Craft. Ascentionis* was another Return of *Parata*, &c. without shewing cause of Delay. The Return also was insufficient, because *Quædam causa spolii civilis & maritima quæ coram*, &c. which is too general, for two Causes;

1. Because (*spolii*) is uncertain, and ought to be specified in some more certainty: besides, it shews not the value of the Goods.

2. That *Maritima est super littus*; or, *in portu maris*: and yet the Admiral hath not Jurisdiction, *Super littus*

navis, or *in portu*; because they are *infra corpus comitat.* And so it was adjudged in *Lacies* Case, *Dyer* 25 *Eliz.* the Abbot of *Ramsey*'s Case, 25 *Eliz. Dyer, fol.* 236. *Pasch.* 27 *Eliz. in Scaccar. at contra Digges*; for which cause he ought to have said, *Super altum mare intra Jurisdictionem Admiralli.* See the Stat. 13 R. 2. *c.* 5. 2 H. 4. *c.* 11 & 39 H. 6. 7.

For the first, all the Court Resolved, that it was insufficient; also there was shewn no time of the spoyl: And for this, in the same Term, the said *Haukridge* was bailed in open Court till the next Term, according to the Books, 6 H. 6. 44. 28 H. 8. *c.* 15.

129. *Note*, it was said by some, That when Judgment is given, that one shall be hanged till he be dead; the King cannot alter the Judgment, and command that he shall be beheaded: for the Execution ought to be conform to the Judgment; and with this accord 35 H. 6 *fol.* 58. and *Stawf. lib.* 1. *fol.* 13. *Vide* 27 *Ass. pl.* 41. F. N. B. 144. 22 *Ass. pl.* 49. Duke of *Somersets* Case; and the Lord *Stanions* Case in Queen *Mary*'s time; and the Lord *Dacres* his Case in H. 8. both which were hanged for Felony.

130. It was Resolved also, That King H. 8. could not by the Law behead his Wives for Treason: for *judicandum est legibus, non exemplis.*

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130. Trin. 9 Jacob. *Regis.*

In this Term, I moved the Justices in *Sergeants* Inne in *Fleetstreet*, upon the Stat. 27 *Jac. cap.* 6. If the Justices of Peace may make a special Warrant to Constables, &c. to have the bodies of parties, who are to take the Oath according to the Statute before them: And it was Resolved by all, *una voce*, that they may; and that for two Reasons.

1. When the Statute gave power to Justices of the Peace,

Peace, to require any persons &c. to take the Oath; the Law *implicite* gave power to make a Warrant to have the body: for *Quando lex aliquid alicui concedit, concedituret id sine quo res ipsa esse non potest.*

2. It is against the Offices of the Justices, and the Authority given them by that Statute, that they shall go and seek the parties: Then I moved, if in such case the Constables may break the Houses of the Parties named in their Warrants; and it seemed to Us all that they cannot, because they are not Offenders, till they refuse to take the Oath before them, or commit some Contempt to the King.

Note, If the person be fugitive in another County, he evades the Statute for the present; but he may be indicted for Recusancy, and the Indictment be removed into the *Kings-Bench*, and they may make Process against them into any County of *England*. Also, if they are in their Houses, the Door being shut, &c. they may be indicted before the Justices of Assize, or Quarter-Sessions; and then after a *Venire Facias*, &c. by force of a *Capias*, their Houses may be broken by the Sheriff, 1 *Eliz. cap.* 2. to which the 23 *Eliz.* refers. *131.*

Memorandum, Hill. 9 *Jac.* All the Justices of *England*, by the Kings Command, were assembled, to consider of these two Statutes: And in the beginning of this Term they were recited and debated; and after good consideration and Conference together, It was Resolved by all, That if one be indicted for Recusancy, the Court may proceed by Process, upon the Stat. 23 *Eliz.* or by Proclamation, according to 28 *Eliz.* And that the Process upon the Indictment, and *Venire Facias*, and *Capias*, &c. and upon the *Capias*, the Sheriff, upon Request made to open the Door, (as in *Seymans* Case) and when by the Sheriff brought into Court, he may, upon refusal of taking his Oath, be generally indicted, &c. But the Justices, upon the second day of Conference, did not speak to the other Point. And this Resolution being reported *5 Co. 91.*

to

to the Lords of the Council at *Whitehall*, (all the Judges being present, 7 *Feb. Hill.* 9 Jacob. *Regis.* We were desired to put our Resolution in Writing: I answered, The Judges never used so to do: But if the Attorney or Solicitor came to us, we will deliver our Opinions to them, *ore tenus*, but not in Writing.

At the third day, upon the Conference in this Term, it seemed upon the Statute 3 *Jac.* If Justices of Peace, upon Refusal before them, commit any person to Gaol with Bayl, and mention in their Warrant the Tender and Refusal, then the Oath ought to be tendred again. But if the *Mittimus* do not comprehend the Tender and Refusal, then they may be generally indicted, as upon Refusal in open Court. And it was Resolved, That the major number of Justices of Peace, who commit the Parties, have Election to commit to the next Assizes, or the next Sessions: And observe, that two Justices (whereof one of the *Quorum*) by the Stat. 7 *Jac.* may commit any person above the Age of 18. and under the Degree of Nobility, although he be not indicted or convict. And it was Resolved by all, That if the Indictment be commenced upon the Stat. 3 *Jac.* upon Refusal in open Court, then the Indictment may be short and general, &c. Not so, if the Indictment be upon the Commitment made by two Justices of the Peace. This is good of any person whatsoever.

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132. *Mich.* 10 Jac. *Regis.* The Earl of *Northampton's* Case.

The Attorney-General informed against *Thomas Goodrick* Gent. Sir *Richard Cox* Kt. *Henry Vernon* Gent. *Henry Minors*, *Thomas Lake* Gent. and *James Ingrum* Merchant, *ore tenus*, in the *Star-Chamber*; and charged *Goodrick*, that he had spoken and published of the E. of *Northampton*, a Peer of the Realm, &c. divers false and horrible Scandals, *scil.* That more Jesuits, Papists, &c. have come into *Eng-*

England, since the Earl of *Northampton* was Guardian of the Cinque-Ports, then before.

2. That the said Earl had writ a Book openly against *Garnet*, &c. but secretly had writ a Letter to *Bellarmine*, intimating, that he writ the said Book, *ad placandum regem sive ad faciendum populum*; and requested, that his Book might not be answered: and that the Archbishop of *Canterbury* had told it the King: and that the said *Goodrick* told it to one *Deusbery*, who acquainted the Earl with it. *Goodrick* being examined, vouches Sir *Richard Cox* for Author; Sir *Richard Cox* vouched the said *Vernon*; *Vernon* cited *Lake*; *Lake*, that he heard it from Sergeant *Nichols*; *Nichols* said one *Speaket* related it to him, and that he heard it from *James Ingrum*; and *James Ingrum* said, that in *October* he heard the said words of two *English* Fugitives at *Ligorn*; but never published them till the Earl of *Salisbury's* death, in *May* last: And all the Defendants confessed at Bar, all that they were charged with; and at the Hearing of this Case were 11 Judges, *Fleming* being absent *propter ægritudinem*.

And so it was Resolved, That the publishing of false Rumours, concerning the King or the Peers, was in some Cases punishable by the Common-Law: But of this were divers Opinions; /133.

1. And first, as to Rumors themselves.

1. They ought to be false and horrible. 2. Such of which Discord may arise betwixt the King and his People, &c. *West.* 1. *c.* 34. 2 *R.* 2. *cap.* 5. 3. The Subversion and Destruction of the Realm, *ibidem*.

2. As to Persons, they are declared to be Prelates, Dukes, Earls, Barons, &c. Justice of the one Bench or other, or any great Officers, &c. 2 *R.* 2. *c.* 5. And the King is contained within *West.* 1. *c.* 34. as appears in *Dyer*, 5 *Mary* 155.

3. As to the third Point, it was Resolved, That if one hear such false and horrible Rumors, it is not lawful

to

to relate them to others: And this appears by the Stat. *viz.* That the Party shall be imprisoned, until he find out the party who spoke them. Which proves, it was an Offence, else he should not be punish'd by Fine and Imprisonment.

It was also Resolved, That the Offenders at the Bar, if against them the Proceedings had been by Indictment, upon these Statutes, no Judgment could be had against them, that they should be imprisoned, till they found their Author: for *Goodrick* did not relate to *Deusbery*, that he heard from Sir *Richard Cox*; but he related the same as of himself: and for this he ought to be indicted for the words which he himself spake: and then *De non apparentibus & non existentibus eadem ratio.*

134. And it was Resolved, That if *A.* say to *B.* Did you not hear that *C.* is guilty of Treason, &c. This is *tantamount* to a Scandalous Publication. If *J. S.* publish, that he hath heard generally, without a certain Author, that *J. G.* was a Traytor or Thief; there an Action, *Sur le case*, lyeth against *J. S.* And a Record was vouched, *Mich.* 33 and 34 *Ed.* 3. and in the 30 *Ass. pl.* 10. and in the *Exchequer*, *Mich.* 18. *Ed.* 1. *Rot.* 4.

The Defendants, in the Case at Bar, for publication of the said words, all the Defendants were punish'd by all the presence, *una voce*, *nullo contradicente*, by Fines and Imprisonment; *Goodrick* and *Ingrum* were Fined the most, because one could find no Author for the Words, concerning the Cinque-Ports; nor the other, any other than unknown persons of *Ligorn*; and therefore 'twas taken as a Fiction of his own.

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135. *Trin.* 10 Jac. *Regis.* Eastwick's Case *in Curia Wardorum.*

King *Philip* and Queen *Mary*, by their Letters-Patents, *de gratia speciali*, &c. granted to *Aringal Wade* in Fee, the Farme

Farm called *Milton* Grange, in the County of *Bedford*, parcel of the Possessions of the late dissolved Monastery of *Woburn*. *Tenendum præd. firmam de nobis & successoribus nostris ut de Manerio nostro de* East-Greenwich *in Com.* Kent, *in capite, per servitium vicessimæ partis unius Feodi Militis pro omnibus redditibus, &c. quibuscunque*: Which Grange, by mean Conveyance, came to *Christopher Eastwick*; after whose death, the Tenure was found *verbatim*, according to the words of the Patents: And the Question was, If the Tenure was by a mean, as of the said Honour, or in *Capite*. And their principal Reason was, That the Letters-Patents shall be construed to the Kings Intention expressed; and in this Case, some Words ought to be rejected, *scil.* these words (*in Capite*) or these words, (*De manerio nostro de* East-Greenwich) for both together cannot stand; and then the better shall be taken for the King: as 5 *Mary*, *Dyer* 162. 15 *H.*7.7. 14 *Ed.*4.5. 3 *H.*7.12. 9 *H.*7.9. 6. *per Hussey*. 13 *H.* 7.4. *per Fineaux*, 19 *H.* 8. *Title Office*. *Brooks* 58. *Action*.

But it was Answered, and Resolved, That the said Grange was held of the King, as of the *Honor*, and not in *Capite*: And the Reason was, because that Tenure of the King in *Capite*, is as much as to say, Tenure in gross, or of the Person of the King. And it appears by antient Records, that in Old Time, all Tenures in Gross, or of the Person of a Subject, were called Tenures in *Capite*; as in *Clauſ.* 9 *H.*3. *membr.* 28. and many other Records; but of late time, *Dicitur de rege ſolummodo terras teneri in Capite*: And therefore when it is said, *Tenendum de nobis in Capite ut de manerio noſtro de* East Greenwich, *&c.* Inasmuch, as it is limited to hold of the King who is Chief, it may be vulgarly said, That the Tenure is in Chief; inasmuch as it is of the King, as of a Mannor.

Secondly, It was Resolved, That the abundant Words shall be extended in Construction of the Law; and not the Words subsequent, which limit the Term in certainty: And with this Resolution agrees *Mich.* 17 and 136.

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38 *Eliz.* 345. *Nota*, That a Tenure of any antient Honors; as *Ravleigh*, *Hagenet*, and *Peverel*, are, by way of Usage and Allowance in all Ages, taken to have the effect of a Tenure in Capite, viz. To have all the Lands in Guard, &c. *Et non vulet ratio contra experimentum.* See *Mag. Chart. cap.* 31. and 11 H. 7. *in Rot. Parliam.* not Printed: and 1 H. 6. c. 4. *Bracton, lib.* 2. *fol.* 87. 30 H. 8. *Dyer* 8. 58. 29 H. 8. *Brook*, Title *Livery*, 28. 57. 5 *Ed.* 3. 5.

Finis Libri Duodecimi.

LIB.

LIB. 13. & *ult.*

Mich. Anno 6. Jacobi *Regis*; *In the* Common-Pleas. *l.*

Willow's Caſe.

IN Treſpaſs brought by *Richard Stallon*, againſt *Thomas Bradye* (which began in *Eaſter* Term, 6 *Jac.* rot. 1845.) for breaking his Houſe and Cloſe at *Fenditton* in Com. *Cambridge*: And the New Aſſignment was in an Acre of Paſture. The Defendant pleads, that the Place where, &c. was the Land and Freehold of *Thomas Willowes*, and *Richard Willowes*; and that he, as Servant, &c. The Plaintiff for Replication ſaith, That the Place where was parcel of the Manor of *Fenditton*, and demiſable, &c. by Copy of Court-Roll in Fee-ſimple; and that the Lords of the Manor, granted the Tenements, in which &c. to *John Stallon* and his Heirs, who ſurrendred them to the ſaid *Willowes*, and *Willowes*, Lords of the ſaid Manor, to the uſe of the Plaintiff and his Heirs, who was admitted, &c. The Defendant rejoyns, and ſaith; True it is, that the Tenements in which &c. were parcel of the Manor, and demiſable &c. and the ſurrender and admittance ſuch *prout*, &c. But the ſaid *Bradye* further ſaith, That the Tenements in which, &c. at *Richard Stallons* Admiſſion, were, and yet are of the clear yearly

yearly value of 53 *s.* 4 *d.* and that within the Mannor there is such a Custome, *Quod rationabilis denariorum summa legalis monetæ* Angliæ, *super quamlibet admissionem cujuslibet personæ tenent. per Dominum vel Dominos Manerii præd. sive per senesch. &c. ad aliquas terras, &c. secundum cons. Maner. illius debetur, & a tempore quo &c. debitum fuit Dom. &c. tempore ejusdem admission. pro fine &c. quod idem Dominus vel Domini vel seneschallus suus Cur. ejusdem Manerii pro tempore existen. usus fuerit, vel usi fuer. per tot. tempus præd. in plena Cur. Maner. illius pro admissione ejusdem personæ, seu earund. personar. sic facta assidere & appunctuare.* Anglicè, Assess and Appoint *eand. ration bil. summam denarior. &c. Et summam sic assessam personæ admissæ, &c. solverent &c. eidem Dom. &c.* And further saith, That the Steward of the said Mannor, at a Court holden the first of *October*, *Anno quarto Regis nunc*, admitted the Plaintiffs to the Tenements, in which &c. and assessed and set a reasonable sum of money, *viz.* 5 *l.* 6 *s.* 8 *d. viz. Valorem eorundem tenementor. per duos annos & non ultra pro fine pro præd. admissione &c.* And the said Steward, at the same Court, gave notice to the Plaintiff, the said sum was to be paid, &c. And further saith, That the *Willowes* and *Willowes* afterwards, *viz.* 2 *Novem.* in the 4th year aforesaid, at *Fenditton* aforesaid, requested the said *Richard Stallon* to pay them the said 5 *l.* 6 *s.* 8 *d.* which the said *Richard* utterly refused, &c. By which, the said *Richard* forfeited to the said *Thomas* and *Richard Willowes* all his Right, Estate, &c. The Plaintiff surjoyneth, and saith, that the said sum of 5 *l.* 6 *s.* 8 *d.* &c. was not *rationabilis finis*, as the said *Thomas Bradley* above hath alleadged, &c. Upon which, the Defendant doth demur in Law, &c. And in this Case, these Points were Resolved by *Coke* Chief Justice, *Walmesly*, *Warberton*, *Daniel*, and *Foster*, Justices.

2. 1. If the Fine had been reasonable, yet the Lords ought to have set a certain time and place when the same should be paid, because it stands upon the point of Forfeiture.

feiture. As if a man assures Lands to one and his Heirs, upon condition to pay to the Bargainee and his Heirs 10 *l.* at such a place; or that he and his heirs shall re-enter: there, because no time is limited, the Bargainor ought to give notice to the Bargainee, &c. when he will tender the money, and he cannot render it when he pleaseth: and with this agrees 19 *Eliz. Dyer* 354. So in the Case at the Bar, the Copyholder is not bound to carry his Fine alwayes with him, &c. And though that the Rejoynder is, that the Plaintiff refused to pay the Fine; so he might well do, when the Request is not lawful or reasonable: And he that is to pay a great Fine, as 100 *l.* or more, it is not reasonable that he carry it alwayes with him; And the Copyholder was not bound to do it, because the Fine was incertain and arbitrable; as was Resolved in *Hulbarts* Case, in the 4th Part of my Reports, among the Copy-hold Cases.

2. It was Resolved, That though the Fine be uncertain and arbitrable; yet it ought to be *secundum arbitrium boni viri*; and it ought to be reasonable, because *Excessus in re qualibet, jure reprobatur communi*: for the Common-Law forbids any excessive Distress, as appears 41 *Ed.* 3. 26. And this doth appear to be the Common-Law; for the Statute of *Articuli super Chartas* extends onely for a grievous Distress taken for the Kings Debt. See F. N. B. 147. *a.* and 27 *Ass.* 51. 28 *Ass.* 50. 11 *H.* 4. 2. and 8 *H.* 4. 16. &c. And so if an excessive Amerciament be imposed in any Court-Baron, or other Court not of Record, the Party shall have *Moderata mis ericordia*: And *Magna Charta* is but an Affirmance of the Common-Law in this Point. See F. N. B. 75. And the Common-Law gives an Assize of *Nuisient* Distress, and multiplication of Distress found, which is Excess. And with this agrees 27 *Ass.* 50, 51. F. N. B. 178 *b.* And if Tenant in Dower, hath Tenants at Will, that are rich, and makes them poor, by excessive Tallages and Fines, this is Wast; F. N. B. 61. *b.* 16 H. 3. *Wast*. 135. and 18 H. 7.

Vide also the Register Judicial. *fol.* 25. B. Waste lyeth *in Exulande Hericum & Hermanum, &c. Villeynes, Quorum quilibet tenet unum messuagium & unam Virgat. terræ in Villenagio in Villa præd. &c.* By all which it appears, the Common-Law forbids excessive oppressing of Villains, &c. So in the Case at Bar, though the Fine is uncertain, yet it ought to be reasonable; and so it appears by the Custome alleadged by the Defendant. See *Hubbard's* Case before, in the 4th Part of my Reports. And when reasonableness concerning a Fine is in question, the same shall be determined by the Court, in which the Action depends, 21 H. 6. 30. 22 Ed. 4 27. and 50 29 H. 8. 32. &c.

3. 3. It was Resolved, That the Fine in the Case at the Bar was unreasonable, being for the admittance of a Copy-holder in Fee-simple, upon a Surrender made; for this is not like a voluntary Grant, &c. for there *Arbitrio Domini res æstimari debet.* But when the Lord is compellable, to admit him to whose use the Surrender is; And when *Cestuy que use* is admitted, he shall be in by him who made the Surrender, and the Lord is but an Instrument to present the same.

4. It was Resolved, That the Surjoinder is no more, than what the Law saith: And for the Causes aforesaid, Judgment was given for the Plaintiff.

4. And *Coke* Chief Justice said in this Case, That if the Court of Admiralty amerce the Defendant excessively at discretion (as seems by 19 H. 6. 7.) the same shall not bind the Party; and be it excessive or not, it shall be determined in the Court, where the Action shall be brought: And a Writ of Account against a Bayliff or Guardian, *Quod reddat ei rationabilem computum*, &c. for the Law requires Reason, and no excuse or extremity in any thing.

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Mich. 6 Jac. Regis. in the Common-Pleas: Porter and Rochester's Case. 4.

This Term *Lewis* and *Rochester*, who dwelt in *Essex*, in the Diocess of *London*, were sued for subtraction of Tythes growing in R. in the said County of *Essex*, by *Porter*, in the Court of the Arches of the B. of *Canterbury* in *London*: And the Case was; The Archbishop of *Canterbury* hath a peculiar Jurisdiction of 14 Parishes, called a *Deanry*, exempt from the Authority of the Bishop of *London*, whereof the Parish of S. *Mary de Arcubus* is the chief: And the Court is called the *Arches*, because it is holden there. And a great Question was moved, If in the said Court of *Arches* holden in *London*, he might cite any dwelling in *Essex*, for subtraction of Tythes growing in *Essex*; or if he be prohibited by the Statute 23 *H.* 8. *cap.* 9. which after Debate at Bar by Councel; and also by Dr. *Ferrard*, Dr. *James*, and others, in open Court; and lastly, by all the Justices of the *Common-Pleas*: A Prohibition was granted to the Court of *Arches*. And, in this Case, divers Points were Resolved by the Court.

1. That all Acts of Parliament, made by the King, Lords, and Commons, in Parliament, are parcel of the Laws of *England*, and therefore shall be expounded by the Judges of the Laws of *England*, and not by the Civillians & Cannonist, although the Acts concern Ecclesiastical Jurisdiction. And in 10 *H.* 7. the Bishop of *London* caused one to be imprisoned, because the Plaintiff said, he ought not to pay his Tythes to his Curate: And the imprisoned Party brought his Action of false Imprisonment, against those that arrested him by the Bishops Command; and there the Matter is well argued what words are within the Statute, and what words are not: So upon the same Statute it was Resolved in 5 *Ed.* 4. in *Keysar's* Case, in the *Kings-Bench*; which see in my Book (a) 2 H. 4. c. 16.

of Presidents: And so the Statutes of *Articuli Cleri* & *Prohibitione regia*: *De Circumspecte agitis*, or 2 *Ed.* 6. *cap.* 13. &c. have always been expounded by the Judges of the Common-Law, as was adjudged in *Wood's* Case, *Pasch.* 29 *Eliz.* So 21 H 8 *cap.* 13. See 7 *Eliz.* Dyer 233. 25 *Eliz.* Dyer 251 14 *Eliz.* Dyer 312. 15 *Eliz.* Dyer 317 18 *Eliz.* Dyer 352 & 347. 23 *Eliz.* Dyer 377.

5. 2. Resolved by *Coke* Chief Justice, *Warburton*, *Daniel*, and *Fosser*, Justices, That the Archbishop of *Canterbury* is restrained by the 23 *H.* 8. *cap.* 9. to cite any one out of his own Dioces: for *Dioc'sis dicitur distinctio, & c. quæ divisa vel diversa est ab Ecclesia alterius Episcopatus & commissa gubernatio in unius*, and is derived a Di, that signifies *duo*, two; et *Electio*, *quia separat duas Jurisdictiones*: And because the Archbishop of *Canterbury* hath a peculiar Jurisdiction in *London*, for this cause it is fitly said in the Title, Preamble, and Body of the Act, that when the Archbishop sitting in his exempt Peculiar in *London*, cites one dwelling in *Essex*, he cites him out of the Bishop of *Londons* Dioces; *ergo*, out of the Dioceses. And in the Clause, of the Penalty of 10 *l.* it is said, Out of the Dioceses &c. where the Party dwelleth; which agrees with the signification of Dioceses before: And the words (*far off*) were put in the Preamble, to shew the great mischief that was before the Act; as the 32 H. 8 *cap.* 33. in the Preamble, it is *disseizins* with strength. And the Body of the Act saith, *such Disseizor*, the same extending to all Disseizors: but Disseizin with force, is the greatest mischief, 4 and 5 *Eliz.* Dyer 219. So *West.* 2 *cap.* 5. adjudged 44 *Ed* 3. 18. See 21 H. 8. *cap.* 15. In all which, the Case is stronger, than the Case at Barre; there the word (*such*) in the Body of the Act, referring to the Preamble, which is not in our Case.

6. 2. The Body of the Act is, No Person shall be henceforth cited before any Ordinary, &c. out of the Dioceses, or peculiar Jurisdiction, where the Person shall be dwelling;

ing; and if so, then *a fortiori*, the Court of Arches which sits in a Peculiar, shall not cite others out of another Dioceſs. And the words (*out of the Dioceſs*) are meant of the Dioceſs or Juriſdiction of the Ordinary where he dwelleth.

3. Obſerve, the Preamble of the Act recites expreſly, That the Subjects were called by compulſory Proceſs to appear in the Arches, Audience, and other Courts of the Archbiſhoprick of this Realm: So that the Intention of the Act was to reduce the Archbiſhop to his proper Dioceſs, unleſs in five Caſes.

1. For any Spiritual Offence or Cauſe committed, or omitted, contrary to Right and Duty by the Biſhop, &c. which word (*omitted*) proves, there ought to be a Default in the Ordinary.

2. Except it be in Caſe of Appeal, and other lawfull Cauſe, where the Party ſhall find himſelf grieved by the Ordinary, after the matter there firſt begun, *ergo*, it ought to be firſt begun before the Ordinary.

3. In caſe the Biſhop or Ordinary, &c. dare not, or will not convent the Party to be ſued before him.

4. In caſe the Biſhop or Judge of the place, within whoſe Juriſdiction, or before whom the Suit by this Act ſhould be begun and proſecuted, be party, directly, or indirectly, to the Matter or Cauſe of the ſame Suit.

5. In caſe any Biſhop, or other inferiour Judge under him, &c. make Requeſt to the Archbiſhop, Biſhop, or other inferiour Ordinary or Judge; and that to be done in Caſes onely, where the Law Civil or Common doth affirm, &c.

1. Alſo there are two Proviſoes which explain it alſo, 7.
viz. That it ſhall be lawful for every Archbiſhop, to cite any perſon inhabiting in any Biſhops Dioceſs in his Province for matter of Hereſie: by which it appears, that for all Cauſes not excepted, he is prohibited by the Act.

2. There is a saving for the Archbishop, calling any Person out of the Diocess where he shall be dwelling, to the Probate of any Testament: which Provisoe should be vain, if notwithstanding that Act should have concurrent Authority with every Ordinary throughout his whole Province: Wherefore it was concluded, That the Arch-Bishop out of his Diocess, unless in the Cases excepted, is prohibited by the 23 *H.* 8. to cite any man out of any other Diocesse: which Act is but a Law declaratory of the ancient Canons, and a true Exposition of them. And that appears by the Canon, *Cap. Romana in sexto de Appellationibus, & Cap. de competenti in sexto.* And the said Act is so expounded, by all the Clergy of *England*, at a Convocation at *London*, *Anno* 1 Jac. *Regis*, 1603. *Canon* 94.

And whereas it is said in the Preamble of the Act, in the Arches, Audience, and other High-Courts of this Realm: It is to be known, that the Archbishop of this Realm, before that Act, had power *Legantine* from the Pope; By which they had Authority not onely over all, but concurrent Authority with every Ordinary, &c. not as Archbishop of *Canterbury*, &c. but by his Power and Authority Legantine. *Et tria sunt genera* Legatorum; 1. *Quidam de latere Dom.* Papæ *mittuntur, &c.* 2. *Dativi qui simpliciter in Legatione mittuntur, &c.* 3. *Nati seu nativi, qui suarum Ecclesiarum prætextu legatione fingantur, et sunt* 4. *Archiepiscopus* Cant. *Eboracensis, Remanensis, et Pisanis*: Which Authority Legantine is now taken away and abolished utterly.

8. 3. It was Resolved, That when any Judges are prohibited by Act of Parliament, if they proceed against the Act, there a Prohibition lyes. As against the Steward and Marshal of the Houshold; *Quod non teneant placita de libero tenemento, de debito, de Conventione, &c.* So *Articuli super Chartas, cap.* 3. Register *fol.* 185. So against the Constable of *Dover*. So to Justices of Assize; *Quod inquisitiones quæ sunt magni exactionis non capiantur in Patria,*

tria. So to the Treasurer and Barons of the Exchequer upon *Art. super Chart. c. 4. Stat. Rutland. cap. ult.* See F. N. B. 45, 46, &c. 17 H. 6. 54. *vide* 13 Ed. 3. Title *Prohibition.* So against all Ecclesiastical Judge, upon 2 H. 5. 3. and therewith agrees 4 *Ed.* 4. 37. and F. N. B. 43. &c. So the Case upon the Stat. 2 H. 5. *c.* 15. as appears by the President, 5 *Ed.* 4. *Keysons* Case, 10 H. 7. 17. See *Paston's* Opinion, 9 H. 6. 3. See the 35 H. 6. 6. when any things is prohibited by a Statute, if the Party be convicted, he shall be fined for the Contempt to the Law. And if every person should be put to his Action upon the Statute, it would encrease Suits, and a Prohibition is the shorter and easier way. And the Rule of the Court was, *Fiat prohibitio Curiæ* Cantuar. *de Archubus. Inter partes pradict. per Curiam.* And *Sherly*, and *Harris*, jun. Sergeants at Law, were of Councel in the Case.

Mich. 6 Jac. Reges. *Edward's* Case. 9.

The High-Commissioners, in Causes Ecclesiastical, objected divers *English* Articles, against *Thomas Edwards* of *Exeter*: As,

1. That Mr. *John Walton*, being trained up in *Oxford* University, was there worthily admitted to several Degrees of Schools, and deservedly took upon him the Degree of Dr. of Physick.

2. That he was a Reverend and well-practised man in the Art of Physick.

3. That you the said *Thomas Edwards*, are no Graduate.

4. That you knowing the Premisses, notwithstanding you the said *Edwards*, &c. of purpose to disgrace the said Dr. *Walton*, &c. did, against the Rules of Charity, write and send to the said Dr. *Walton*, a lewd and uncharitable Letter, taxing him therein of want of Skill and Judgment in his Profession, &c. And so far you exceeded in

your said uncivil Letter; that you told him therein, in plain terms, *He may be crowned for an Ass*, &c.

5. And further to disgrace the said Mr. Dr. *Walton*, in the said University, did publish a Copy of the said Letter to Sir *William Courtney*, and others; and in your Letter was contained *Sipsclam lichenen mentegram*; Take that for your Inheritance, and thank God you have a good Father. And did you not covertly imply thereby, that the said Dr. *Waltons* Father (late Bishop of *Exeter*) was subject to the *French* Pox and Leprosie, &c.

10. 6. That in another Letter you sent to Dr. *Moders*, Dr. in Physick also, you named Dr. *Walton*, and made a Horn in your Letter: Whether you meant not thereby, that they were both Cuckolds; or what other meaning you had.

7. You knowing Dr. *Walton* to be one of the High-Commission in the Diocess of *Exeter*; and having obtained a Sentence against him in the *Star-Chamber*, for contriving and publishing a Libel, did triumphingly say, You had gotten on the Hip a Commissioner for Causes Ecclesiastical, &c. which you did to disgrace him, and him the whole Commission in those Parts.

8. That after the Letter Missive sent to you, you said arrogantly, That you cared not for any thing this Court can do, for that you can remove this Matter at your pleasure.

And this Term it was moved to have a Prohibition in this Case; and the matter was well argued: And at last it was Resolved by *Coke* Chief Justice, *Warberton*, *Daniel*, and *Foster*, Justices; That the first six Articles were meerly Temporal; and, in truth, is, in the nature of an Action upon the Case, for Scandal of Dr. *Walton* in his Profession of Physick; and therefore, for them a Prohibition doth lye, for divers Causes.

1. Because the Persons and Matters are Temporal.

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2. Because it is for Defamation; which if any such shall be for the same, it ought to begin before the Ordinary, because it is not such an enormous Offence, which is to be determined by the High-Commissioners; nor doth Suit lye before them, for calling the Doctor Cuckold, as in the seventh Article; And 'twas said, the Commissioners ought to incur the danger of *Præmunire*.

2. It was Resolved, That the Ecclesiastical Judge cannot examine any man upon his Oath, upon the Intention and Thought of his Heart; for *cogitationis pœnam nemo emoret*: for the Proverb saith, *Thought is free*. And therefore for the 6th and 7th, were Resolved, as well for the Matter, as for the Form, to be such, to which the Defendant was not compelled to answer: And that to the 7th, he might justifie the same; because it appears upon his own shewing, that the Doctor was sentenced in the *Star Chamber*: Also, the Libel is meer Temporal; and if it were Spiritual, such a Defamation is not examinable before the High-Commissioners.

As to the last Article, it appeareth now by the Judgment of this Court, that he might well justifie the said Words: Also, the Commissioners shall not have any Conuzance of Scandal to themselves, they being Parties; and such Scandal punishable by the Common-Law, as was resolved in *Hales* Case in *Dyer*, and in my Book of Presidents, *Hales* Indictment, &c. 11.

The Bishop of *Winchester*, being Visiter of *Winchester*-School, and other his Collegues, *Anno* 5 *Car.* cited the Usher of the said School, by force of the said Commission, to appear before them, &c. for which they incurred the danger of *Præmunire*: So did the Bishop of *Canterbury*, and his Collegues, for citing one *Humphry Frank*, Master of Arts, and School-Master of *Sevennock* School, &c. and proceeding, &c.

Which.

11. Mich. 6 Jac. Regis. *Taylor* and *Shoyl*'s Case.

Taylor informed upon the Statute, 5 *Eliz. cap.* 4. *Tam pro Dom. Regequam pro se*, in the *Exchequer*: That the Defendant had used the Art and Mystery of a Brewer, &c. and averred, That *Shoyl* the Defendant did not exercise the Art or Mystery of a Brewer, at the time of making the Act, nor had been Apprentice 7 years, &c. The Defendant demurred in Law, upon the Information, and Judgment was given against him by the Barons. And now in this Term, upon a Writ of Errour, the Matter was argued at *Serjeants* Inne before the two Chief Justices: And two matters were moved.

1. One, That a Brewer is not within the said Branch of the said Act; for the words are, That it shall not be lawful to any Persons, other than such as now use lawfully any Art, Mystery, or Manual Occupation, to set up or use any Art, Mistery, or Mannal Occupation, except he shall have been brought up therein 7 years at least as an Apprentice. And 'twas said, That the Trade of a Brewer is not any Art, Mystery, or Manual Occupation within the said Branch, because it is easily and presently learned, and needs not 7 years Apprenticeship to learn the same, it being every Country Housewifes Work: And the Act of H. 8. is, That a Brewer is not a Handicraft Artificer.

12. 2. It was moved, That the said Averment was not sufficient; for it ought to be as general, as the Exception in the Statute is.

1. To the first, it was Resolved, That the Trade of a Brewer, *viz.* To hold a Common Brewhouse, to sell Beer or Ale to another, is an Art and Mystery within the said Act: for in the beginning of it, it is Enacted, That no Person shall be retained for less time than a whole year in any the Services, Crafts, Mysteries, or Arts of Cloathing

ing, &c. Bakers, Brewers, &c. Cooks &c. Upon which words in the said Branch, the Information is grounded: Also, because every Housewife brews for her private use; so also she bakes and dresseth meat; yet none can hold a Common Bakehouse, or Cooks Shop, to sell to others, unless he hath been an Apprentice, &c. And the Act 22 *H.* 8. *c.* 13. is explained, That a Brewer, Baker, Surgeon, and Scrivener, are not Handicrafts mentioned in certain penal Laws; but the same doth not prove, but they are Arts or Mysteries.

2. As to the second, it was Resolved, That the Intention of the Act was, that none should take upon him any Art, but he who hath Skill or knowledg in the same: for, *Quod quisque norit in hoc se exerceat.* And so the first Judgment was affirmed.

Mich. 6 Jac. *Regis. In the* Common-Pleas; Modus Decimandi. *The Case of* 12.

Sherly Sergeant moved to have a Prohibition, because a Parson sued to have Tythes of *Sylva Cædua*, under 20 years growth in the Weild of *Kent*, where by the Custom no Tythes were ever paid of any Wood: And if such a Custom, *in non Decimando*, for all Lay-people within the said Weild, were lawful or not, was the Question. And to have a Prohibition, it was said, That though one particular man shall not prescribe *in non Decimando*; yet such a general Custom within a great Countrey might well be; as in 43 *Ed.* 3. 32. And the 45 *Ed.* 3. *Custome* 15. where an Abbot purchased Tenements after the Statute &c. and saith, That being Lord of the Town, &c. there was a Custom in the said Town, that when Tenant ceaseth for 3 years, the Lord may enter, &c. And that his Tenant ceased for 2 years, and he entred: And the Rule of the Court is, Because it was an usage only in that Town, he was put to answer, by which appears, that a Custom

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was not good in a particular Town; that perhaps might be good in a Country, &c. See 40 *Ass.* 21. & 27. 39 *Ed.* 3. 2. See also 7 *H.* 6. 26. *b.* 16 *Ed.* 2. *Prescription* 53. *Dyer* 363. 22 *H.* 6. 14. 21 *Ed.* 4. 15. and 45 *Ass.* 8. Doct. & Stud. *lib.* 2. *cap.* 55. A particular Country may prescribe to pay no Tythes for Corn, &c. but with this Caution, that the Minister hath sufficient portion besides to maintain him, to celebrate Divine Service. And *fol.* 172. it is holden, That where Tythes have not been paid of Under-woods, under 20 years growth, that no Tythes shall be paid for the same: And *fol.* 174. that such a Custome of a whole Country, that no Tythes of a Lordship shall be paid, is good: But the Court would advise, Whether such a Custom of a Town or Country be good: But in antient times, the Parishioners have given or procured to the Parson, a Wood, or other Lands, &c. To hold to him and his Successors, in satisfaction of all Tythes of Wood in the same Parish, the Parson so seized of the same, that without question is a good discharge of his Tythes; and if he sue for the same, a Prohibition lyes.

13. I will cite an antient Judgment many years past, *&c.* 25 *H.* 3. *Wilts. Rot.* 5. before the King at *Westminster*; *Samson Folyet* brought an Attaint upon a Prohibition, against *Thomas* Parson of *Swinden*, because he sued him in the Spiritual Court, for a Layfee of the said *Samson* in *Draycot*, contrary to the Kings Prohibition, &c. and the Parson was condemned in 20 Marks, &c. which agrees with the Rule and Reason of the Law, continued unto this day: For Presidents in *Ed.* 2. *Ed.* 1. *H.* 3. and King *John*, and more antient, are not to be now followed, unless they agree with the Law and practice at this day; Statutes having changed some, and *Desuetude* antiquated others. There are two Points adjudged by the said Record.

14. 1. That satisfaction may be given in discharge of payment of Tythes: And if the Successor of the Parson enjoy the thing given in satisfaction of the Tythes, and yet

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sueth for Tythes in kind, he shall have a Prohibition, because that he chargeth his Layfee with Tythes, which is discharged of them: By which it doth appear, that Tythes cannot be discharged, and altogether taken away and extinct. And herewith agrees the *Register*, which is the most antient Law-Book, *fol.* 38. By which also it appears, That Tythes may be discharged, and that the matter of discharge ought to be determined by the Common-Law, and not in the Spiritual Court. Also by the Act of *Circumspecte agatis*, made 13 *Ed.* 1. It is said, *S. Rector petat verius Parochianos oblationes & decimas debitas & consuetas* &c. Which proves, there are Tythes in kind, and other Tythes due by Custom, as a *Modus Decimandi*, &c. And yet it is Resolved, 19 *Ed.* 3. *Jurisdiction* 28. the Ordinance of *Circumspecte agatis* is not a Statute, and that the Prelates made the same; and yet then the Prelates acknowledged, That there were Tythes due by Custome, which is a *Modus Decimandi*. By which it appears also, that Tythes, by Custom, may be altered to another thing. See 8 *Ed.* 4. 14. F. N. B. 41. g. *vide* 3 *Ed.* 3. 17. 16 *Ed.* 3. *Annuity* 24. 40 *Ed.* 3. 3. *b.* and F. N. B. 152. And if the Lord of a Manor hath alwayes holden his Manor discharged of Tythes, and the Parson had before time of memory divers Lands in the same Parish of the Gift of the Lord, of which the Parson is seized at this day in Fee; in respect of which, the Parson, nor any of his Predecessors, ever had received any Tythes of the said Mannor: If the Parson now sue for Tythes of the said Mannor, the Owner of the Mannor may shew that special Matter, &c. And the Proof, that the Lord of the Manner gave the Lands, that Tythes should never be paid, at this day is good Evidence, to prove the surmise of the Prohibition.

19 *Ed.* 3. Tit. *Jurisdiction* 28. It is adjudged, That Title of Prescription shall be tryed in the Kings Court: And therefore a *Modus Decimandi*, which accrues by Cu- 15.

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ſtom and Preſcription likewiſe. It appears 31 *H.* 4. *cap.* 6. that the Pope, by his Bulls, diſcharged divers from payment of Tythes, againſt which the Act was made, 31 *H.* 8. *cap.* 13. Poſſeſſions of Religious Perſons given to the King were diſcharged of payment of Tythes in certain Caſes, 32 *H.* 8. *cap.* 7. provides all Tythes to be ſet as formerly, except ſuch as are diſcharged. So 2 *Ed.* 6. *c.* 13. by which appears, one may be diſcharged of Tythes five wayes.

16. 1. By the Law of the Realm, *viz.* the Common-Law, as Tythes ſhall not be paid of Coales, Quarries, Bricks, Tyles, &c. *F. N. B.* 53. and *Reg.* 54. nor of the after-Paſture of a Meadow, &c. nor of Rakings, nor of Wood to make Pales, or Mounds, or Hedges, &c.

2. By the Statutes of the Realm, as 31 *H.* 8. 13. 45 *Ed.* 3. &c.

3. By Priviledge; as thoſe of St. *Johns* of *Jeruſalem* in *England*, the *Ciſtertians*, *Templers*, &c. as appears 10 *H.* 7. 277 *Dyer*.

4. By Preſcription; as by *Modus Decimandi*, annuall recompence in ſatisfaction as aforeſaid.

5. By reall Compoſition; as appears by the Writ cited out of the *Regiſter*: By all which appears, That a man may be diſcharged of payment of Tythes as aforeſaid. So as now it is apparent by the Law of *England*, both Antient and Modern, that a Lay-man ought to preſcribe in *Modo Decimandi*, & not *in non Decimando*; and that, in effect, agrees with *Thomas Aquinas*, in his *ſecunda ſecundæ*, *Quæſt.* 86. *ar. ultimo*. See *Doct. & Stud. lib.* 2. *cap.* 55. *fol.* 164. That the Tenth Part is not due by the Law of God, nor by the Law of Nature, which he calls the Law of Reaſon: And he cites *John Gerſon*, a Doctor of Divinity, in a Treatiſe which he calleth, *Regulæ morales*, *viz. Solutio Decimarum Sacerdotibus eſt de Jure Divino*, *quatenus iade ſuſtententur*, *ſed quoad tam hanc vel illam aſſignare aut in alios reditus commutare poſitivi Juris eſt*. And he holds, that a Portion is due by

by the Law of Nature, which is the Law of God: but it pertains to the Law of Man to assign *Hanc vel illam partionem*. And saith further, That Tythes may be exchanged into Lands, Annuity, or Rent, &c. And also, that in *Italy*, and other the East-Countries, they pay not Tythes, but a certain Portion, according to the Custom: And forasmuch as the Tenth Part is now due, *Ex Institutione Eccl'iæ*, that is, by their Canons; and it appears by 25 *H* 8. *cap.* 19. That all Canons, &c. made against the King's Prerogative, &c. are void, and that Law was but Declaratory; for no Statute or Custome of the Realm can be abrogated by any Canon, &c. and that well appeareth by 10 *H* 7. *fol.* 17. *cap.* 18.

The second Point, which agrees with the Law at this day, which was adjudged in the said Record, 25 *H.* 3. is, That the Limits and Bounds of Towns and Parishes, shall be tryed by the Common-Law, and not by the Spirituall Court. And in this the Law hath great Reason, for thereupon depends the Title of Inheritance of the Layfee, whereof the Tythes were demanded; for Fines and Recoveries are the common Assurances of Lay-Inheritances; and if the Spiritual Court should try the Bounds of Towns, if they determine that my Land lyeth in another Town, than is contained in my Fine, Recovery, or other Assurance, I am in danger to lose my Inheritance; and therewith agree 39 *Ed* 3. 19. 5 *H.* 5. 10. 32 *Ed.* 4. *Consultation*, 3 *E.* 4. 14. 19 *H.* 6. 20. 50 *Ed.* 3. 20. and many other Presidents to this day. And Note, There is a Rule in Law, that when the Right of Tythes shall be tryed in the Spiritual Court, and the Spiritual Court hath Jurisdiction of the same, that our Courts shall be ousted of the Jurisdiction, 35 H. 6. 47. 38 H. 6. 21. 2 *Ed.* 4. 15. 22 *Ed.* 4. 13. 38 *Ed.* 3. 36. 14 H. 7. 17. 13 H. 2. *Jurisd.* 19. and when not ousted, 12 H. 2. *Jurisdiction* 17. 13 *E.* 2. *ibid.* 19. 7 H. 4 34. 14 H. 4. 17. 38 *Ed.* 3. 56. 42 *Ed.* 3. 12. And the Causes why the Judges of the Common-Law would not permit the Ecclesiastical

/7.

Judges

Judges to try *Modum Decimandi*, being pleaded in their Court, is, because that if the Recompence which is to be given to the Parson, in satisfaction of his Tythes, doth not amount to the value of his Tythes in kind, they would overthrow the same: And that appears by *Lindwood*, among the Constitutions, *Simonis Mepham tit. de Decimis cap. Quoniam propter, fol.* 139. b. *verbo Consuetudines.* And that is the true Reason, and therefore a Prohibition lyes: and therewith agrees 8 *Ed.* 4. 14. and the other Books aforesaid, and infinite Presidents. See 7 *Ed.* 6. *Dyer* 79. and 18 *Eliz. Dyer* 349. the Opinion of all the Justices.

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18 Mich. 6 *Jacobi* Regis. *In the* Exchequer; Baron *and* Boyse *Case.*

In the Case between *Baron* and *Boys*, in Information upon the Stat. 5 *El.* 6. *cap.* 14. of Ingrossers, after Verdict, it was found for the Informer, that the Defendant had ingrossed Apples, against the said Act. The Barons held clearly, that Apples were not within the Act, and gave Judgment against the Informer, upon the matter apparent to them, and caused the same to be entred in the Margin of the Record, where the Judgment was given. The Informer brought a Writ of Errour in the *Exchequer* Chamber; and the onely Question was, Whether Apples were within the said Act. The Letter of which is, *viz. That whatsoever person, &c. shall ingross, or get into his or her hands, by buying, &c. any Corn growing, or other Corn, or Grain, Butter, Cheese, Fish, or other dead Victuall, &c. to sell the same again, shall be accepted, &c. an unlawful Ingrosser.* And though the Stat. 2 *Ed.* 6. c. 15. numbreth Butchers, Brewers, Bakers, Cooks, Coster Mongers, and Fruiterers, as Victuallers; yet Apples are not dead Victuals within the 5 *Ed.* 6. there being no Proviso for Coster-mongers and Fruiterers in the said Act, as there are for Buyers and Sellers of Corn, and other Victuals. Also, very

ever since the Act, they have bought Apples by Ingross and sold them again; and yet no Information was ever before this for the same; being for Delicacy, more than necessary Food. But the Stat. 5 Ed. 6. is intended of things necessary for sustenance of man, where the Statute of 2 *Edward* the 6. 15. made against Conspiracies, to enhance the Prices, was done by express words, to extend it to things, which are more of pleasure, than profit. But this was not resolved by the Justices, because the Information was conceived upon that Branch of the Statute concerning Ingrossers.

Hill. 27 *Eliz.* in *Chancery.* 19.

Hill. 27 *Eliz.* In *Chancery* the Case was thus: *Ninian Mewil* seized of certain Lands in Fee, took a Wife, and levyed a Fine of the said Lands with Proclamations, and afterwards was indicted and outlawed of High-Treason, and dyed: The Conusees convey the Land to the Queen, who is now seized: The five years pass after the Husband's death, the Daughters and Heirs of the said *Ninian*, in a Writ of Errour in the *Kings-Bench*, reverse the said Attainder *M.* 26 and 27 *Eliz.* and thereupon the Wife sues to the Queen by Petition, containing all the special matter: Which Petition being indorsed by the Queen, *Fait droit aux Parties*, &c. the same was sent into *Chancery*, as the manner is.

And in this Case, divers Objections were made against the Demandant.

1. That the Fine with Proclamations, should bar the Wife of Dower, and the Attainder of her Husband should not help her; for as long as that remained in force, the same was a Bar also of her Dower: But admit the Attainder of the Husband shall avail the Wife, the same being reversed by a Writ of Errour, and so in Judgment of Law, as if it had never been, and against

which a man might plead there is no such Record, agreeing with the Book 4 *H.* 7. 11. and the Case in 4 *H.* 7. 10. *b.* is, *A.* seized of Land in Fee, was Attaint of High Treason: The King grants the Land to *B.* and afterwards *A.* committed Trespass upon the Land: and after by Parl. *A.* was restored, and the Attainder void: This shall be as reasonable and ample to *A.* as if no Attainder had been. Afterwards *B.* brings Trespass for the Trespass Mesne; and it was adjudged 10 H. 7. *f.* 22. *b.* that the Action of Trespass was not maintainable, because the Attainder was annulled, *ab initio.*

20. 2. It was objected, That the Wife could not have a Petition, because there was not any Office, by which her Title of Dower was found, *viz.* her Marriage, her Husbands Seizin and Death: for it was said, that though she was marryed, yet if her Husband was not seized after the Age that she is Dowable, she shall not have Dower: And the Title of him that sueth by Petition, ought to be found by Office, as appears by the Books, 11 *H.* 4. 52. *Fitz.* 31. 30. *Ass.* 28. 46 *Ed.* 3. *brev.* 618. 9 H. 7. 24. &c.

3. As to the first, it was Resolved, That the Wife should be endowed, and that the Fine with Proclamations was not a Bar to her: and yet it was Resolved, That the Act 4 *H.* 7. *c.* 24. shall barre a Woman of her Dower by such a Fine, if the Woman bring not her Writ of Dower within five years after the Husbands death, as was adjudged *Hill.* 4 *H.* 8. *Rot.* 344. in the Common-Pleas, and 5 *Eliz. Dyer* 224. For by the Act, the Title of Feme-Covert is saved by taking Action in 5 years, after she is uncovert, &c. But it was Resolved, That the Wife was not to be aided by that saving; for in respect of her Husbands Attainder, she had not any Right of Dower at his death, nor could sue for the same after his death: But it was Resolved, That the Wife was to be aided by another former saving in the same Act, *viz.* And saving to all other persons, *viz.* who were not Parties to the Fine, such

such Action, Right, &c. as shall first grow or come, &c. to them, after the Fine ingrossed, and Proclamations made, by force of any Gift in Tail, or other Cause or Matter before the Fine levyed; so that they take their Action, and pursue their Title, within 5 years after such Right come to them, &c. And, in this Case, the Action and Right of Dower accrewed to the Wife, after the Reversal of the Attainder, by reason of a Title of Record before the Fine, by reason of the Seizin in Fee (*had*) and Marriage (*made*) before the Fine levyed, according to the meaning of the said Act.

And as to the Point of Relation, it was Resolved, That 21.
sometimes by construction of Law, a thing shall relate, *ab initio*, to some intent, and to some not: for *relatio est fictio Juris*, to do a thing which was and had effence, to be annulled, *ab initio*, betwixt the same Parties, to advance a Right, but not to advance a Wrong, which the Law hates; or to defeat Collateral Acts, which are lawful, and chiefly, if they concern Strangers: for true it is, as hath been said, that as to the mean profits, the same shall have relation by construction of Law, till the time of the first Judgment given; and that is to favour Justice, and advance his Right that hath Wrong by the Erroneous Judgment. But if a Stranger hath done a Trespass upon the Land in the mean time, he who recovereth, after the Reversal, shall have an Action of Trespass against the Trespassors: and if the Defendant pleads, there is no such Record, the Plaintiff shall shew the Special Matter, and maintain his Action. And for the better apprehending the Law on this Point, it is to know, That when any man recovers any Possession or Seizin of Land, in any Action, by Erroneous Judgment, and afterwards the Judgment is reversed, as is said before; and thereupon the Plaintiff, in the Writ of Errour, shall have a Writ of Restitution, and that Writ recites the first recovery; and the Reversal of it in the Writ of Errour, is, That the Plaintiff in the Writ of Errour, shall be resto-

red to his Poſſeſſion and Seizin, *una cum exitibus* thereof, from the time of the Judgment, &c. *Tibi præcipimus quod eadem A. ad plenariam ſeizinam tenementor. præd. &c. reſtitui facias, & per Sacramentum proborum, &c. diligenter inquiras ad quantum exitus & profictus tenementor. illor. &c. a tempore falſi Judicii &c. uſque ad Oct. Sanct. Mich. anno &c. quo die Judicium illud &c. revocat. fuit &c. et qualiter hoc præcept. &c. in Oct. &c.* By which it appears, that the Plaintiff, in the Writ of Errour, ſhall have Reſtitution againſt him who recovereth, of all the mean Profits, without any regard by them taken: for the Plaintiff, in the Writ of Errour, cannot have Remedy againſt a Stranger: and therefore the words of the ſaid Writ command the Sheriff to inquire of the Iſſues and Profits generally &c. And therefore the Plaintiff, in the Writ of Errour, after the Reverſal, ſhall have any Action of Treſpaſs for a Treſpaſs mean; and therewith agreeth *Brian* Chief Juſtice, 4 *H.* 7. 12. *a.* See *Butler* and *Baker's* Caſe, in the third Part of my Reports, good matter concerning Relations: So as it was Reſolved in the Caſe at Bar, though to ſome intent the Reverſal hath relation; yet to bar the Wife of her Dower by fiction of Law, by the Fine with Proclamations, and five years paſt after the Husbands death; when, in truth, ſhe had not cauſe of Action, nor any Title, ſo long as the Attainder ſtood in force, ſhould be to do a Wrong by a fiction in Law, and to bar the Wife, who was a meer ſtranger, and could have no Relief, till the Attainder was reverſed.

22. As to the other Objection, That the Demandant on the Petition, ought to have an Office found for her, It was Reſolved, That it needed not in this Caſe, becauſe the Title of Dower, ſtood with the Queens Title, and affirmed it. Alſo, in this Caſe, the Queen was not intitled by any Office, that the Wife ſhould be driven to traverſe it, for then ſhe ought to have had an Office: But in caſe of Dower, though that Office had been found for the

Queen,

Queen, which doth not diſaffirm the Title of Dower, in ſuch Caſe the Wife ſhall have her Petition without Office. See *Sadlers* Caſe, in the Fourth Part of my Reports.

And the Caſe put on the other ſide, was utterly denied by the Court; for it was Reſolved, That if a man ſeized of Lands in Fee, take a Wife of eight years of Age, and alien his Lands; and after the Wife attains to the Age of nine years, and afterwards the Husband dyeth, that ſhe ſhall be endowed; becauſe the Title of Dower being not conſummate till the death of the Husband, and there being Marriage, Seizin in Fee, age of 9 years, and the Husbands death, for that cauſe ſhe ſhall be endowed; it being ſufficient, that the Marriage, Seizin, and Age happen during the Coverture. So if a man ſeized of Lands in Fee take a Wife, and after ſhe elopes from her Huſband, now ſhe is barrable of her Dower, if during the elopement, the Husband alien; and after the Wife is reconciled, ſhe is Dowable: So if a man hath Iſſue by his Wife, and the Iſſue dyeth, and afterwards Land diſcends to the Wife, or ſhe purchaſe Lands in Fee, and dyes without other Iſſue, the Husband (for the Iſſue which he had before the Diſcent or Purchaſe) ſhall be Tenant by the Courteſie. But if a man taketh an Alien to Wife, and afterwards he aliens his Lands, and after that ſhe is made a Denizen, ſhe ſhall not be endowed; for ſhe was not by her Birth capable of Dower, but by her Denization it began. But in the other Caſe, there was only a Temporary Bar, untill ſuch Age or Reconcilement; which being accompliſht, the Temporary Bar ceaſeth.

Trin. 44 Eliz. *In the Kings-Bench*; Sprat *and* Heale's *Caſe.* 23.

John Sprat Libelled in the Spiritual Court againſt *Walter Heal*, for Subſtraction of Tythes; the Defendant in

the Spiritual Court, that he had divided the Tythes from the Nine Parts. And then the Plaintiff made Addition to the Libel (in nature of a Replication) *viz.* That the Defendant divided the Tythes from the Nine Parts, *quod prad.* the Plaintiff *non fatetur sed prorsus diffitetur:* yet presently after this pretended division, *in fraudem legis*, he took and carryed away the same Tythes, and converted them to his own use: and thereupon the Plaintiff obtained Sentence in the Spiritual Court, and to recover thetreble value, according to the Statute 2 *Ed. 6. cap.* 13. And thereupon *Heale* made a Surmise, that he had divided his Tythes, and that the Plaintiff ought to sue in the Spiritual Court for the double value, and at the Common-Law for the treble value.

But it was Resolved by the whole Court, That the said Division mentioned in the Libel, was not any Division within the said Stat. 2 *Ed. 6. cap.* 13 for that Act provides, That all the King's Subjects henceforth, shall truly and justly without Fraud, divide, set out, yield and pay all manner of other Predial Tythes in their proper Land: So as when he divides them to carry them away, he divides them not justly without Fraud; and therefore the same is out of the Statute: And where the words of the Statute are, *divide, set out*, &c. their Predial Tythes, &c. And if any person carry away his Corn and Hay, and other Predial Tythes, &c. And to make an evasion out of these words, *this Invention was devised*; The Owner of the Corn, by Covin sold his Corn, before severance, to another, who as Servant to the Vendee reaped it, and carryed it away without any Severance, pretending that neither the Vendor, because he did not carry them away; nor the Vendee, because he had no property in them, should be within that Statute: But it was Resolved, That the Vendor should be charged in that Case with the Penalty of the Statute, for he carryeth them away, and his Fraud and Covin shall not help him. See 8 *El.* 3. 290. 9 *H.* 6. 41. 33 *H.* 6. 5. But it

was

was Resolved, That the Plaintiff could not sue in the Spiritual Court for the treble value, but for the double value he might.

Hill. 6 Jac. Regis. *In the* Common-Pleas, *Neal and Rowse's* Case. 24.

At a *Nisi Prius* in *London*, before my Self this Term, the Case was this: *Edward Neal* informed upon the Stat. 21 H 8. c 5. Which Plea began *Mich.* 6 *Jac. Rot.* 1032. against *James Rowse*, Commissary and Official within the Archdeaconry of *Huntington*, in the Diocese of *Lincoln*; and having Probate of Wills, &c. in the same Archdeaconry: And that *Nicholas Neal*, in the 34 year of the Reign of the said King *James*, made his Testament in Writing, and made the Plaintiff his Executor, and dyed possessed of Goods and Chattels, to the value of 150 *l.* The Defendant, then Commissary and Official, &c. the 23 *Feb.* 1605. at the Parish of St. *Mary Bow*, *Testament. præd. probat. it &c. ac per manus cujusdam* Thomæ Nicke, *tunc Ministri ipsius* Jacobi Rowse *&c.* 14 *s.* 10 *d. pro probatione &c. Testament. præd. de eodem* Edwardo, *&c. qui tam &c. Colore Officii sui præd. ad tunc et ibid. extortive recepit et habuit contra formam Statuti*: With this, that the said *Edward qui tam, &c.* will adde, That the Writing of the said Testament, according to the Rate of a peny for every ten Lines, every Line containing in length ten Inches, *non attingebat*, to the Sum of 12 *s.* 4 *d.* according to the form of the Statute aforesaid, &c. The Defendant pleaded *nihil debet*; and at the *Nisi Prius*, the Evidence of two Witnesses was, That the Plaintiff caused the said Testament, which was in Paper, to be engrossed in Parchment; and the Plaintiff offered both to the said *Rowse* to be proved; who answer'd it should, if his Fees shall be paid him: And the Plaintiff asking

him, What were his Fees? and he wrote them in a Paper, which amounted to 14 *s.* and 10 *d.* Whereupon the Plaintiff laid upon the Table 20 *s.* and deſired him to take what was due to him, (*all this being in the Officials houſe*) but he would take nothing there, but appointed the Plaintiff to come into Court, where he would receive his Fees: And accordingly the Plaintiff coming into Court, and praying to have the ſaid Will proved; the Defendant required the ſaid *Nicke* to take of him for the Probation, Inſinuation, Regiſtring, and Sealing, 14 *s.* 10 *d.* and thereupon put the Seal of the Office to the ſame Parchment, that the Plaintiff brought him, &c.

25. And it was objected, That this Caſe was out of the Statute; for thereby, as to this purpoſe, it is provided, *viz. And where the Goods of the Teſtator, &c. amount above the value of* 40 l. *that then the Biſhop nor Ordinary, nor any of his or their Regiſters, Scribes, Proctors, &c. or any other their Miniſters, for the Probation, Inſinuation, and Approbation of any Teſtament, &c. for the Regiſtring, Sealing, Writing, &c. any Inventories, Acquittances, Fines, or any thing concerning the ſame Probate of Teſtaments, &c. ſhall take, &c. but only four ſhillings, and not above. &c.*

And the Defendants Councel objected, That the Defendant did not take the 14 *s.* 10 *d.* &c. For no Probate was written upon the Teſtament it ſelf, nor any Seal put to it, but the Teſtament was ingroſſed in Parchment, and the Probate and Seal put to the Tranſcript, and not the Teſtament, and ſo out of the Statute: The Statute extends only when the Probate and Seal is put to the Teſtament it ſelf, &c. But I conceived, that the ſaid taking the 14 *s.* 10 *d.* in the Caſe at Bar, was clearly againſt the Statute; for the Act is in the Negative: And if the Executor requires the Teſtament to be ingroſſed in Parchment, he ought to agree with him, that he requires

to

to do it, as he may. But the Ordinary, Official, &c. ought not to exact any Fee for the same, as due to him, for divers causes.

1. Because the words of the Act are expressed for the Probation, &c. and for the Registring, Sealing, Writing, &c. Which word (*writing*) extends expressly to this Case.

2. The words are, (*or any thing concerning the same Probate*) and when the Seal and Probate is put to the Transcript, the same (without question) concerns the Probate. 26.

3. Such a Construction would make the Act idle and vain; for if the Ordinary, Official, &c. might take as much as he pleaseth, for the Ingrossing done by his Ministers, as a due to him, all the purview of the Statute, which is penned so precisely concerning persons, should be all in vain, by that evasion of Transcribing it, as well against the express Letter of the Act, as the intention of it. And the Act ought to be expounded, to suppress Extortion, which is a great affliction and impoverishing of the Subjects.

4. As this Case is, he annexes the Probate and Seal to the Transcript ingrossed, which the Plaintiff brought him; so as the Case at Bar was with question: And afterwards the Jury found for the Plaintiff. And of such Opinion was *Walmesly*, *Warberton*, *Daniel*, and *Foster*, Justices, the next Term in all things: But upon Exception, in Arrest of Judgment, for not pursuing of the Act, in the Information, Judgment is not yet given, &c.

Hill. 6 *Jac.* Regis. *In the Common-Pleas.* 26.

In this Term, a Question was moved to the Court, which was this: If Tenant in Burgage should pay aid to the King, to make his eldest Son Knight. And the Point

Point rests upon this: If Tenure in Burgage, be a Tenure in Socage; for by the antient Common-Law every Tenant in Knights Service, and in Socage, was to give to his Lord a reasonable Ayd, to make his eldest Son a Knight, and to marry his eldest Daughter; and that was uncertain at Common-Law, and also incertain when the same should be paid. And this appears by *Glanvil, lib. 9. cap. 8. fol. 70.* who wrote in the time of *Henry* the second, *Nihil autem certum statutum est de hujus modi auxiliis dandis vel exigendis*, &c. And in the beginning of the Chapter it is called *rationabile auxilium*, because then it was not certain, but to be moderated by Reason, in respect of Circumstances: The like appears by the Preamble of the Statute, *West. 1. 3 Ed. 1. cap. 35.* The said Act put those incertainties to a certainty.

27. 1. That for a whole Knights Fee there be taken but 20 *s.* and of 20 *l.* Lands holden in Socage 20 *s.* and of more, more; and of less, less; whereby the Ayd it self became certain.

2. That none might levy such Ayd, to make his Son a Knight, untill his Age of 15 years; nor to marry his Daughter, till her Age of 7 years: And *Fleta*, who wrote after that Act, calls them *rationabilia auxilia*, &c. And by the Stat. 25 *Ed. 1.* *c. 6.* where it is provided, That no Taxes shall be taken, but by common consent of the Realm, there is an Exception of the Antient Ayds; which is to be intended of these Ayds: But notwithstanding the said Act of *West. 1.* it was doubted, if the King were bound by it, being not expresly named: And therefore *Ed. 3.* in the 20 year of his Reign, took an Ayd of 40 *s.* of every Knights Fee, to make the Black Prince Knight, and then nothing of Lands holden in Socage: and to take away all question concerning the same, it was confirmed by Parliament, and after 25 *Ed. 3. cap. 11.* It is Enacted, That reasonable Ayd, to make the Kings eldest Son Knight, and to marry his eldest Daughter, shall be levyed

levyed after the form of the Stat. made thereof; and not in other manner. Now *Littleton, lib. 2. cap. 10. fol. 36. b.* Burgage Tenure is, where an antient Borough is, whereof the King is Lord; and those who have Tenements within the Borough, hold of the King, That every Tenant, for his Tenement, ought to pay to the King a certain Rent. And such Tenure, is but Tenure in Socage; and all Socage Land is contributary to Ayd; and therefore a Tenant in Burgage shall be contributary to Ayd.

It appeareth in the *Register, fol.* 1, 2. in a Writ of Right, Lands held in Knights Service, are said, *Quas clamat tenere per servitium unius Feodi militis.* And Socage Lands, *Quas clamat per liberum servitium unius cumini, &c.* So F. N. B. 82. *Rationabile auxilium de militibus et liberis tenentibus*; where *Militibus* distingusheth Knights Service from Socage, which is called *libtris tenentibus.* But it appears by the Books of *Aowry* 26. and 10 H. 6. So *Antient Demesne* 11. It was Resolved by all the Justices in the *Exchequer* Chamber, That no Tenure shall pay for a reasonable Ayd, but Tenure by Knights Service, and by Socage; but not by *Grand Sergeanty*, nor no other. And 13 H. 4. 34. agrees to the Case o *Grand Sergeanty.* And I conceive, that *Petit Sergeanty* shall also pay Ayd: for *Littleton, lib. 2. cap. 3. fol. 36.* sayes, That such a Tenure is but Socage in effect; though *Fitzh. N. B.* 83. *A.* avouch the contrary, 13 H. 4. 34. And I conceive, That he who holds a Rent of the King by Knights Service, or in Socage, shall pay Ayd, according to the words in *West. 1. cap. 35.* And though it was said, that a Tenure in Socage, is *servitium Socæ*, as *Littleton* saith; and the same cannot be applyed to Houses: To that it was answered, That the Land upon which the Houses are built, or if the House fall down, may be made arable and plowed. See *Huntington, Polydor Virgil*; and *Hollinsheads* Chron. *fol.* 35. 15 H. 4. Ayd was levyed by H. 1. 7. to marry *Maud* his eldest Daughter to the Em-

Emperour, *viz.* 3 *l.* of every Hide of Land &c. See also, *The Grand Customary of Normandy, cap.* 35. there is a Chapter of Aydes. See also the Stat. made 19 H. 7. which beginneth thus: *Item Præfati Communes in Parliamento præd. existent. ex assensu, &c. concesserunt præfat. Regi quod. pecuniæ summam, in loco duorum rationabilium auxiliorum suæ Majestat. de jure debit. &c.* See *Rot.* 30 H. 3. *Ex parte Roman. Dom. To. Saur. in scemino, in auxilio nobis concess. ad primogenitam filiam nostram maritand.* And H. 3. had an Ayd granted by Parliament, *Ad Isabellam sororem suam Imperatori.* But that was of Benevolence.

29 *Rot.* 42 H. 3. *bid.* 6. *Monstrat.* R. Johanne *le* Francois *Baron de Scaccario quod cum Dom. Rex non caperet nisi* 20 *s. de integro Feodo Mil. de auxilio &c. Ibid. in Regno* 2 Ed. 1; *Rot.* 3. *de auxilio ad Militiam*; Which is meant of Knight's of the Kings Son. *Note*, If one with n Age, be in Ward of the King, he shall not be contributary to Ayd; but his Tenants that hold of him shall, as appears by that Record.

Ibid. 30 *Ed.* 1. *Ibid. T. R.* 34 E. 1. *Ibid. Hill* 4 H. 4. *Rot.* 19. *de rationabili auxilio de Will. Dom. Roos.* The like *M. Rot.* 5 H. 4. *Rot.* 33. Lincoln & *Rot.* 34. Lincoln, & *Rot.* 35 Lincoln, & *Tr. R.* 5 H. 4. *Rot.* 2. Kanc. & *Rot.* 3. Kanc. & *Rot.* 5. Kanc. See *ibid. R.* 21 *Ed.* 3. *Rot. Cantab. de auxilio ad filium Regis primogenitum faciend. per Episcopum Eliens.* See also, *ib d.* 20 *Ed.* 3. *Rot.* 13 & 14. *de auxiliando ad primogenitum filium Regis Militem faciend.* By all which before cited, it appeareth, that Tenure in Burgage is subject to the payment of Ayd.

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30. *Hill.* 6 Jacob. *Regis. Prohibitions.*

Upon *Ashwednesday* in *Feb.* 1606. A great Complaint was made by the President of *York*, to the King, That the Judges

Judges of the Common-Law, had, in Contempt of the Kings Command last Term, granted 50 or 60 *Prohibitions* out of the *Common-Pleas*, to the Presidents and Councel of *York*, after the 6th of *February*, and named 3 in particular. 1. Between *Bell* and *Thawpts*. 2. Another between *Snell* and *Huet*. 3. And another, in an Information of a Riotous Rescue by *English* Bill, by the Attorney-General, against *Christopher Dickenson*, one of the Sheriffs of *York*, and others, in rescuing one *William Watson*, out of the Custody of the Deputy of one of the Purseyvants of the said Councel, who had Arrested the said *Watson*, by force of a Commission of Rebellion, by the said President and Councel awarded: Which *Prohibition*, upon the Information, was (as was said) denyed, upon a Motion in the *Kings-Bench* the last Term; but granted by Us. And the King sent for me, to answer the Complaint; and I onely, all the rest of the Justices being absent, waited upon the King; who, in the presence of *Egerton*, Lord Chancellor, and others of the Privy-Councel, rehearsed to me the Complaint aforesaid. And I perceived well, that the King had thereupon conceived great displeasure against the Judges of the *Common-Pleas*, but chiefly against Me: To which (I having the Copy of the Complaint sent me by the Lord Treasurer) answered in this manner: That I had made search in the Office of *Prothonotaries* of the *Common-Pleas*; and as to the Cases between *Bell* and *Thawpts*, and *Snell* and *Huet*, no such could be found; but I would not take advantage of a Misprisal: And the truth was, the 6th of *February*, the Court of *Common-Pleas* had granted a *Prohibition* to the President and Councel of *York*, between *Lock* Plaintiff, and *Bell* and others Defendants; and that was a *Replevin* in *English* was granted by the said President and Councel, which I affirmed was utterly against Law: for at Common-Law no *Replevin* ought to be made, but by Original Writ directed to the Sheriff: and the Statute of

of *Marlbridge*, *cap.* 21. and *West.* 1. *cap.* 17. authorize the Sheriff to make a *Replevin*. So 29 *Ed.* 3. 21. 8 *Eliz. Dyer* 245. And the King by his Instructions neither had made the President and Councel Sheriffs, nor could grant them Power to make a *Replevin* against Law; which the Lord Chancellor affirmed for very good Law; and it may well be, we have granted others in the like Case. Another *Prohibition*, I confess, we have granted between Sir *Ethel Knight*, now Sheriff of the County of *York*, as Executor to one *Stephenson*, who made him and another his Executors, and preferred an *English* Bill against *Chambers*, and others, in nature of an Action of the Case, upon a Trover and Conversion of Goods and Chattels in the Testators Life, to the value of 1000 *l.* And because the other Executor would not joyn with him, he had no remedy at Common-Law; but was forced to pray remedy there in Equity. And I say, the President and Councel have not any Authority to proceed in that Case, for divers causes.

31. 1. Because there is an express Limitation in their Commission, that they shall not hold Plea between Party and Party, &c. unless both or one of the Parties, *tanta paupertate sunt gravati*, that they cannot sue at Common-Law; and in that Case the Plaintiff was a Knight, Sheriff, and man of great quality.

2. Because by that Suit the King was deceived of his Fine, which was 200 *l.* because the Damages amounted to 4000 *l.* And that was one of the Causes, that the Sheriff began his Suit there, and not at Common-Law. Another Cause was, that their *Decrees* which they take upon them, are final and uncontroulable, either by Errour, or any other Remedy; which is not so in the Kings Courts, where there are five Judges: for they can deny Justice to none who hath Right; nor give any Judgment, but what is controulable by Erreur, &c. And if we shall not grant *Prohibitions*, in Cases where they hold Plea with-

without Authority, then the Subjects shall be wrongfully oppressed without Law, and we denyed to do them Justice. And their Ignorance in the Law appeared, by allowing that Suit, *viz.* That the one Executor had no Remedy at Common Law, because the other would not joyn in Suit with him; whereas every one Learned in the Law knows, that Summons and Severance lyeth in any Suit brought as Executors. And this was also affirmed by the Lord Chancellor.

Another *Prohibition*, I confess, we granted between the L. *Wharton*, who by *English* Bill, before the Councel, sued *Banks*, *Buttermere*, and others, for fishing in his several Fishings in *Darwent*, in the County of C. in nature of an Action of Trespass at Common-Law, to his Damages of 200 *l.* and for the Causes before recited; and because the same was meerly determinable at Common-Law, we granted a *Prohibition*: And that also was allowed by the Lord Chancellor. Then the King asked me the Case of Information, upon the Riotous Rescous: To which, I answered, That one exhibited a Bill there, in the nature of an Action of Debt, upon a *Mutuatus* against *Watson*, who upon his Oath affirmed, that he had satisfied the Plaintiff, and owed him nothing: yet because he did not deny the Debt, the Councel Decreed the same against him; And upon that Decree, the Pursuyvant was sent to Arrest the said *Watson*, who Arrested him; upon which the Rescous was made: And because the Action was in the nature of an Action of Debt, upon a *Mutuatus*, where the Defendant at Common-Law might have waged his Law, the *Prohibition* was granted; and that was also affirmed by the Lord Chancellor. Also, I affirmed it was Rescous, because the principal cause belonged not to them; but it might be a Riot, yet not punishable by them, but by course of Law, by a Commission of *Oyer* and *Terminer*. 32.

Also,

Also, I confess, that we have granted divers *Prohibitions* to stay Suits there by *English* Bill, upon penal Statutes, for the manner of prosecution, as well for the Action, Process, &c. as for the Court, is to be pursued, and cannot be altered: and therefore, without question, the Councel, in such Cases, cannot hold Plea; which was affirmed also by the Lord Chancellor. And I said, no Court of Equity can be Erected at this day without Act or Parl. as was Resolved in Q. *Eliz.* time in *Parots* Case; and lately in the Case of the President and Councel of *Wales*.

And the King was well satisfied with these Reasons, who gave me his Royal Hand, and I departed from thence in his favour.

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33. Pasch. 7 *Jac.* Regis.

This Term a Question was moved at *Sergeants Inne*, who, by the Common-Law, ought to repair the Bridges, common Rivers and Sewers, and the High-ways, and by what means they shall be compelled to it; and first of Bridges. And as to them, it is to be known, that of common right all the Country shall be charged: and therewith agrees, 10 *Ed.* 3. 28. *b.* and the Stat. 22 *H.* 8. *cap.* 5. was but an affirmance of the Common-Law in that Point. He that hath Toll of Men or Cattel passing over a Bridge, ought to repair the same, when no other is bound by Law to do it, for he hath Toll to that purpose: *Et qui sentit commodum, sentire debet & onus*: and with this agrees 14 *Ed.* 3. *Bar.* 276. Also, a man may be bound to repair a Bridge, *ratione tenuræ*, of certain Land, but a particular person cannot be bound by Prescription: for if he have not profit by the same, his Ancestors Act shall not bind him: But an Abbot or Corporation may be charged by Prescription, and may bind their Successors.

Vid.

Vide 21 E. 4. 28. 27 Ed. 3. 8. 22 Ass. 8. 5 H. 7. 3. Yea they shall be compelled, if time out of mind they have repaired it, though of Alms; and therewith agrees 10 E. 3. 28. So of a High-way, all the Country ought to repair it; but some may be bound particularly, as in the Case of Bridges. As he who hath Land adjoyning, ought to scour and cleanse the Ditches, next to the way to his Land; and therewith agrees the Book, 8 H. 7. 5. So of a common River, all who have Passage by it, ought to scour and cleanse it, for it is as a common Street; as it is said, 27 Ass. and 37 Ass. 10.

Pasch. 7 *Jacobi* Regis. Sir *William Reades* and *Booth's* Case. 34.

In the great Case of Forgery in the *Star-Chamber*, between Sir *William Read* Plaintiff, and *Roger Booth*, and *Cuthbert Booth*, and others, Defendants; the Case was thus: *Roger Booth* 38 *Eliz.* was Convict in that Court of publishing a Writing under Seal, forged in Sir *Thomas Gresham's* Name, of a Rent-charge of 100 *l.* out of all his Lands, &c. to one *Markham* for 99 years, dated 21 year of Queen *Elizabeth's* Reign, knowing it to be forged: And afterwards the said Sir *William Read* exhibited the said Bill against the said *Boothes*, and others, for forging another Writing under Seal, dated the 20th of *Elizabeth*, in the said Sir *Thomas Gresham's* Name, purporting a Deed of Feoffment of all his Lands (except certain) to Sir *Rowland Heyward*, and *Edward Hoogen* and their Heirs, in effect, to the use of *Markham* the younger, and his Heirs, and for publishing the same, knowing it to be forged, was the Bill exhibited. And upon hearing this Cause this Term, these Doubts were moved upon the Stat. 5 *Eliz. c.* 14.

1. If one who is Convict of publication of a Deed of Feoffment or Rent-charge, knowing the same to be forged

ged, again at another day forge another Deed of Feoffment or Rent-charge, if he be within the Case of Felony within the Act: which Doubt ariseth upon these words (*eft-soons*) committed again any of the said Offences.

2. The second Doubt was, If a man commit two Forgeries, one in 37 *Eliz.* the other, in 38 *Eliz.* and he is first convicted of the last, if he may now be impeached for the first.

3. When *Roger Booth* was Convict in 38 *Eliz.* and after is charged with a new Forgery, in 37 *Eliz.* If the Witnesses proving in truth, that it was forged after the first Conviction, if the *Star-Chamber* hath Jurisdiction of it.

4. When *Cuthbert Booth*, who was never Convict of Forgery before, if in truth the Forgery was done, and so proved in 38 *Eliz.* If he might be convicted upon this Bill, because the Forgery is alleadged before it was done.

1, 2. To the first and second Doubts, It was resolved by the two Chief Justices, and Chief Baron; That if one be Convict of Forgery, or publishing any Writing concerning Free-hold, &c. within the first Branch, or concerning Interest or Term of Years, &c. in the second Branch, and be convicted, if afterwards he offend, either against the first Branch or second, that the same is Felony. As if he forge a Writing concerning an Interest for Years within the second Branch, and be convicted; and after he forgeth a Charter of Feoffment within the first Branch, *et econverso*, that is Felony, by express words of the Act. But if one forge a Writing in 37 *Eliz.* and after he forge another in 38 *Eliz.* yet it is not Felony, though he forge many Writings one after another; for the Forgery, &c. which is Felony by the Act, ought to be after Conviction, or Condemnation, of a former Writing.

3. As

3. As to the third Doubt, It was Resolved, That the Allegation of the time, by the Plaintiff in the Bill, shall not alter the Offence, but shall give to the Court Jurisdiction: But if it appear, that the Forgery or Publication was after the Sentence, then the Court shall forceasse. 35.

4. As to the last Point, It was Resolved, That the time of the Forgery is not material, if it be committed before the exhibiting the Bill. But if the date of such Writing, supposed to be Forged, had been mistaken, there the Defendant could not be condemned of a Deed of another Date.

Pasch. 7 *Jac.* Regis. *The Case of Sewers.* 35.

The Case was, There was a Cawsey or Milstank of Stone in the River of *Dee*, and in the City of *Chester*; which Cawsey, before the Reign of King *Edward* the first, was Erected for the necessary maintenance of certain Mills at the end of the said Cawsey. And now a certain *Decree* was made by certain Commissioners of Sewers, for a Breach to be made by ten Poles in length, in the said Cawsey: and it by any *Decree* of the Commissioners, by force of any Statute, any breach may be made in that Cawsey, was the Question: And it was referred, by Letters of the Lords of the Privy-Council, to the Chief Justices, and Chief Baron; who, upon hearing of Councel Learned, at divers dayes, and good Consideration had of all Statutes of Sewers, and Conference among themselves, It was Resolved as followeth;

1. That the Stat. of *Magna Chart. cap.* 23. *Quod omnes Kidelli deponantur, &c.* extended onely to *Kidells, viz.* Open Wears for taking Fish: But the first Stat. that extended to pulling down or abating any Mills, Mill-Stanks, or Cawseyes, was 25 *Ed.* 3. *cap* 4. which appointed onely such to be pulled down, as were Erected in the

Reign of King *Edward* the first, or after. But by 1 *H.* 4. *cap.* 12. upon complaint in Parliament, of great damages, by inhansing Mills, Mill-stanks, &c. made before *Edward* the first's Reign, that Act appoints them to be surveyed; and such as were found to be much inhanced, to be corrected. None of which Acts, extend to the Case in question: for that Cawsey was erected before *Edw.* 1. and never inhanced since the Erection. And the 12 *H.* 4. *c.* 7. confirms all the said Acts. And by the 23 *H.* 8. *c.* 5. none of the said Statutes are repealed, as to the Case in question; for thereby the Form and Effect of the Commission of Sewers is appointed, and power given to the Commissioners to survey Walls, &c. Fences, Cawseys, &c. Mills, &c. and to correct, repair, or pull down, &c. as cause requireth, according to their discretions, &c. after the effect of the Statutes made before the 1. of *March*, 23 *H.* 8. By which appears, that the Commissioners discretion was limited, *viz.* to proceed according to the Statutes and Ordinances before made, &c. And the said Act provides, That all and every Statute, Act, and Ordinance heretofore made, concerning the Premises, not contrary to this Act, nor repealed, shall stand good, and be effectual for ever. But the said Acts 25 *Ed.* 3. and 1 *H.* 4. are not contrary to the said Act, nor repealed: and always such construction ought to be made, that one part of the Act may agree with another. And, according to this Resolution, We certified the Lords of the Council, that the said Stat. 25 *E.* 3. & 1 *H.* 4. remained yet in force; and that the Authority given by the Commission of Sewers, did not extend to Mills, Mill-stanks, Cawseys, &c. erected before *Ed.* 1. unless they have been inhanced; and then they are not to be subverted, but reformed, by abating the Inhancement onely.

Trin.

Trin. 7 *Jacobi* Regis. *The Case* de modo Decimandi, *and of* Prohibitions. 37.

Richard Archbishop of *Canterbury*, with the Bishops of *London*, *Bath* and *Wells*, and *Rochester*, and divers Doctors of the Civil and Canon-Law; as Dr. *Dun*, Judge of the *Arches*, Dr. *Rennet* Judge of the *Prerogative*, Dr. *James*, Dr. *Martin*, and others, came and attended the King at *White-Hall*, the *Thursday*, *Friday*, and *Saturday*, after *Easter* Term, in the Council-Chamber; where the Chief Justice, and I my self, *Daniel* Judge of the *Common-Pleas*, and *Williams* Judge of the *Kings-Bench*, by the King's Command attended also; where the King, assisted with his Privy-Council, all sitting at the Council-Table, spake as a most Gracious Soveraign, to this effect: As He would not suffer any Novelties or Innovations in his Courts of Justice, Ecclesiastical and Temporal; so he would not have any the Laws, which had Judicial Allowances, in the Times of his Predecessors Kings of *England* to be forgotten. And forasmuch as Contentions between the Temporal and Ecclesiastical Courts, cannot but breed great Inconvenience to the Subjects, especially when the Controversie ariseth upon the Jurisdiction of his Ordinary Courts of Justice; And because he was the Head of Justice, immediately under God, and knowing what hurt may grow to his Subjects, when the Jurisdiction of his Courts are drawn in question; He thought it concerned him, as a King, to hear the Controversies between the Bishops and Clergy, and the Judges of his Laws of *England*, and to take Order, that the one do not encroach upon the other. And He said, The onely Question then to be disputed was, If a Parson or Vicar of a Parish, sues one of his Parish in the Spiritual Court for Tythes, in Kind, or Layfee; and the Defendant alleadgeth a Custom or Prescription, *de modo Decimandi*; if that Custom

or Prescription shall be tryed and determined before the the Judge Ecclesiastical, where the Suit is begun, or a Prohibition lyeth to try the same by the Common-Law. And the King directed, that We who were Judges, should declare the Reasons of our Proceedings, and what Authorities in the Law we had to warrant our Proceedings, in granting Prohibitions in Cases *de modo Decimandi*. But the Archbishop of *Canterbury* kneeled before the King, and desired he would hear him, and others, provided to speak in the Case, for the good of the Church of *England*. And the Archbishop inveighed chiefly against two things.

1. That a *Modus Decimandi* should be tryed by a Jury, because they themselves claim more or less *modum Decimandi*; so as, in effect, they were Tryers in their own Cause, or in the like Cases.

38. 2. He inveighed much the precipitate and hasty Tryals by Juries, and after him Dr. *Bennet* made a large Invection against Prohibitions, *in causis Ecclesiasticis*; and he made five Reasons, why they should try *modum Decimandi*.

1. The first and principal was out of the *Register*, *fol.* 58. *quia non est consonus rationi, quod cognitio accessarii in Curia Christianitatis impediatur ubi cognitio causæ principalis ad forum Ecclesiasticum noscitur pertinere*. And the principal cause is Right of Tythes, and the Plea of *Modus Decimandi* sounds in satisfaction of Tythes; and therefore the Conuzance of the Original Cause, *viz.* the Right of Tythes belonging to them, the Conuzance of the Bar of Tythes belonged to them: And whereas it is said in the second Part of my Reports, in the Bishop of *Winchesters* Case; and 8 *Ed.* 4. 14. that they would not accept of any Plea, in discharge of Tythes, in the Spirituall Court; he said, they would allow such Pleas, and had allowed them, being duly proved before them.

2. There

2. There was great inconveniency, that Lay-men should be Tryers of their own Customs, for they shall be Jurors in their own Cause.

3. That the Custom of *Modo Decimandi* is of Ecclesiastical Jurisdiction, for it is a manner of Tything, and all manner of Tything belongs to Ecclesiastical Jurisdiction; and therefore he said, if the Right of Tythes be of Ecclesiastical Conuzance, and the Satisfaction also for them of the same Jurisdiction, the same shall be tryed in the Ecclesiastical Court.

4. In the Prohibitions of *Modus Decimandi*, Averment is taken, that though the Plaintiff in the Prohibition offer to prove *Modum Decimandi*, the Ecclesiastical Court doth refuse to allow it: but he said they would allow such Plea; and therefore, *Cessante causa cessabit et effectus*, and no Prohibition shall lye.

5. He said, he can shew many Consultations granted in the Cause, *de modo Decimandi*, and a Consultation is of greater force then a Prohibition. And *Bacon* Sollicitor General, being (as it said) assigned with the Clergy by the King, said less then Dr. *Bent*; but he vouched, 1 *R.* 3. 4. the Opinion of *Hussey*, when the Originall ought to begin in the Spiritual Court, and afterwards a thing cometh in Issue, and is Tryable by our Law, yet it shall be tryed by their Law. See the *Register* 57, 58. 38 *Ed.* 3 5. and 38 *Ed.* 3. 6.

And the Judges made humble Suit to the King, That 39.
in regard they perceived his Majesty, in his Princely Wisdom, detested Novelties and Innovations, that He vouchsafe to suffer them to inform him of one Innovation, which they did conceive would tend to hinder the Administration of Justice within his Realm.

Your Majesty, for the due Administration of Justice, hath made 14 Judges, to whom you have committed not onely the Administration of ordinary Justice, but *crimina Læsæ Majestatis*: Also, in Parliament, we are called by Writ, to give our Advice and Council to your Majesty

and the Lords, when we are required. We two Chief Justices sit in the *Star-Chamber*, *Chancery*, *Court of Wards*, and other High-Courts of Justice; We, in our Circuits, do visit twice in the Year your Realm, and execute Justice according to your Laws: and if We receive any diminution of such Reverence and Respect in our Places, which our Predecessors had, We shall not be able to do You such acceptable Service as they did. The state of the Question is not *in statu deliberativo*, but *in statu judiciali*; it is not disputed *de bono*, but *de vero*, *non de lege fienda sed de lege lata*: Not to devise or frame new Laws, but to inform You what Your Law of *England* is: And it was never seen before, that when the Question is of the Law, that your Judges of the Law have been made Disputants with their Interiours, that daily plead before them in the several Courts at *Westminster*. And though we are not afraid to dispute with Mr. *Bonner*, and Mr. *Bacon*; yet this Example being *primæ impressionis*, and your Majesty detesting Novelties, We leave it to your Princely Consideration, whether you will permit our answering *in hoc statu judiciali*. But in obedience to your Majesties Command, We will inform your Majesty touching the said Question, which We and our Predecessors before Us have oftentimes adjudged, upon Judicial Proceedings in your Courts of Justice at *Westminster*; which Judgments cannot be reversed or examined for any Errour in Law, if not by a Writ of Errour in a more High and Supream Court. And that this is the antient Law of *England*, appears by the Stat. of 4 H. 4. c. 23.

40. And We being commanded to proceed, all that was said by Us the Judges, was to this effect: That the Tryal *de modo Decimandi*, ought to be by the Common-Law, by a Jury of Twelve Men, it appears in three Manners:

1. By the Common-Law.
2. By Acts of Parliament.

3. By

3. By infinite Judgments, and Judicial Proceedings, long times past without interruption.

But first, it is to see what is a *Modus Decimandi*: Now *Modus Decimandi* is, when Lands, Tenements, or Hereditaments, have been given to the Parson and his Successors, or an Annual certain Sum, or other Profit, alwayes time out of mind, in full Satisfaction and Discharge of all Tythes in kind in such a place: and such manner of Tything is now confessed by the other Party, to be a good Bar of Tythes in Kind.

1. That *Modus Decimandi* shall be tryed by the Common-Law; and therefore put that which is the most common Case: That the Lord of the Mannor of *Dale* prescribes to give to the Parson 40 *s.* yearly, in full Satisfaction and Discharge of all Tythes, growing within the said Mannor of *Dale*, at the Feast of *Easter*. The Parson sues the Lord of the Mannor of *Dale* for his Tythes, of his Mannor in kind, and he in Bar prescribes *ut supra*. The Question is, If the Lord of the Mannor of *Dale* may upon that have a Prohibition; for if the Prohibition lye, then the Ecclesiastical Court ought not to try it.

1. First, The Law of *England* is divided into Common-Law, Statute, and Customs; and therefore the Customs of *England* are to be tryed by the Tryal, which the Law of *England* appoints.

2. Prescriptions by the Law of the Holy Church, and by the Common-Law, differ in the times of Limitation: and therefore Prescriptions and Customs of *England*, shall be tryed by the Common-Law. See 20 *H. 6. f.* 17. 19 *E.* 3. *Jurisdiction* 28. The Bishop of *Winchester* brought a Writ of Annuity against the Arch Deacon of *Surrey*, and declared, That he and his Successours were seized by the Hands of the Defendant, by Title of Prescription; and the Defendant demanded Judgment, if the Court would hold Jurisdiction between Spiritual Persons, &c. *Stone* Justice, *Be assured, That upon Title of Prescription, we will there hold Jurisdiction.*

And

And upon that, *Wilby* Chief Justice, gave the Rule, *Answer*: Upon which it follows, That if a *Modus Decimandi* which is an Annual sum for Tythes by Prescription, comes in Debate between Spiritual Persons, that the same shall be tryed here. 32 *E.* 2. *Jurisdiction* 26. There was a Vicar who had onely Tythes and Oblations, and an Abbot claimed an Annuity or Pension of him by Prescription; and it was adjudged, That the same Prescription, though between Spiritual Persons, shall be tryed here. *Vide* 22 *H.* 6. 46, 47.

41. 3. See the Record, 25 *H.* 3. cited in the Case of *Modus Decimandi* before; and see *Register fol.* 38. *b.*

4. See the Stat. of *Circumspecte agatis, Decimæ debitæ, seu consuetæ*; which proves that Tythes in kind, and a *Modus* by Custom, &c.

5. 8 *E.* 4. 14. and F. N. B. 41. *g.* A Prohibition lyes for Lands given in discharge of Tythes, 28 *E.* 3. 97. *a.* There was a Suit for Tythes, and a Prohibition lyes.

Ly.

6. 7 *E.* 6. 79. If Tythes are sold for Money; by the Sale, the Things Spiritual are made Temporal: And so in the Case *de modo Decimandi*, 42 *E.* 3. 12. agrees.

7. 22 *E.* 3. 2. Because any Appropriation is mixed with the Temporalty; otherwise, of that which is meer Temporal. So it is of reall Composition, where the Patron ought to joyn. *Vid.* 11 *H.* 4. 85.

2. Secondly, By Acts of Parliament.

1. The said Act of *Circumspecte agatis*, that gives power to the Ecclesiastical Judge, to sue for Tythes first due in Kind, or by Custom, *viz. Modus Decimandi*. So as by that Act, though the Yearly Sum foundeth in the Temporalty, which was paid by Custom, in discharge of Tythes; yet because the same comes in the place of Tythes, and by Constitution, the Tythes are changed into Money, and the Parson hath not any remedy for the same, which is the *Modus Decimandi* at the Common-Law. For that cause

cause the Act is clear, that the same was a Doubt at the Common-Law. And the Stat. of *Articuli Cleri, cap.* 1. If that corporal punishment be changed into *pœnam pecuniariam*; for that Pain, Suit lyes in the Spiritual Court: For which, see *Mich.* 8 *H.* 3. *Rot.* 6. *in Thesaur.* And by the 27 *H.* 8. *cap.* 20. It is Enacted, That all Subjects of the Realm, according to the Ecclesiastical Law, and after the laudable Usages and Custom of the Parish, &c. shall yield and pay his Tythes, &c. and for substraction thereof, may, by due process, &c. compell him to yield the Duties: and with that, in effect, agrees 32 *H.* 8. *c.* 7. By the 2 *Ed.* 3. *c.* 13. It is Enacted, That all the Kings Subjects shall henceforth truly and justly, without Fraud, &c. divide &c. and pay all their Predial Tythes in their proper kind as they rise, &c. And always, when an Act of Parl. commands or prohibits any Court, be it Spiritual or Temporal, to do any thing Spiritual or Temporal, if the Stat. be not obeyed, a Prohibition lyes; as upon the Stat. *de artic. super chart. cap.* 4. *Quod communia Placita non teneantur in Scaccario.* A Prohibition lyes to the Court of *Exchequer*, if the Barons hold a common Plea there; as appears in the *Register* 187. *b.* So upon the Stat. *West.* 2. *cap.* 38. *Quod inquisitiones quæ magnæ sunt examinationis non capiantur in Patria.* A Prohibition lyes to the Justices of *Nisi Prius.* So upon *Articuli super chartas, cap.* 7. to the Constable at *Dover*, *Regist.* 185. *b.* So upon the same Stat. *cap.* 3. to the Steward and Marshal of the Houshold, 185. and yet no Prohibition is given by express words, in any of these Statutes. So upon the Statutes 13 *R.* 2. *c.* 5. 15 *R.* 2. *c.* 3. 2 *H.* 4. *c.* 11. a Prohibition lyes to the Admiralty Court. So upon *West.* 2. *c.* 43. against Hospitals and Templers, *Regist.* 39. *a.* So upon the Stat. *de Prohibitione regia*, a Prohibition lyes. So upon the Stat. 2 *H.* 5. *c.* 3. and upon that Stat. 4 *E.* 4. 37. the Case was; *Peirce Peckham* took Letters of Administration, of the Goods of *Rose Brown*, of the Bishop of *London*: afterwards *T. T.* sued to *Thomas* Archbishop of *Canterbury*, to have Administration

minisstration committed to him, because *Rose Brown* had Goods in his Diocess, and they were granted to him. Afterwards T. T. Libelled in the Court of the *Arches* against *Peirce Peckham*, to repeal his Administration; and *Peirce Peckham*, according to the Stat. prayed a Copy of the Libel, and could not have it; and thereupon he sued a Prohibition, and upon that an Attachment. And there *Catesby* Sergeant moved, that a Prohibition did not lye for two Causes.

43. 1. The Statute says, that the Libel shall be deliver'd, but not that the Plea shall surcease.

2. The Statute is not intended of Matter meerly Spiritual: And there *Danby* Chief Justice; *If you will not deliver the Libel, according to the Statute, you do wrong, which wrong is a Temporal matter, and punishable at the Common-Law, and therefore the party shall have a special Prohibition.* And always after the said Act, in every Term, throughout the Reigns of *Ed.6.* Q. *Mary*, and Q. *Eliz.* to this day, Prohibitions have been granted in *Modo Decimando*, and Judgments given upon many of them, without any contradiction; and accordingly all the Judges Resolved, 7 *Ed.6. Dyer* 79. *Et contemporanea expositio est optima et fortissima in lege, et minime mutanda sunt quæ certam habuerunt interpretationem.*

1. As to the first, *Objection*, That the Plea of *Modus Decimandi*, is but accessary to the Right of Tythes; It was Resolved, That the same was of no force, for three Causes:

1. In this Case, admitting there is a *Modus Decimandi*, then by the Custom; and by the Act 2 *E.6.* and the other Acts, the Tythes in Kind are extinct and discharged; for one and the same Land cannot be subject to two manner of Tythes; but the *Modus Decimandi* is all the Tythe with which the Land is chargeable: and it shall be intended, that the *Modus Decimandi* began at first by reall Composition: So as in this Case, there is neither Prin-

Principal, nor Accessary, but an Identity of the same thing.

2. The Stat. 2 *Ed.* 6. being a Prohibition in it self, and that in the Negative; If the Ecclesiastical Judge doth against it, a Prohibition lyes; as appeareth clearly before.

3. Though the Rule be general, yet it appears by the Register it self, that a *Modus Decimandi* is out of it: for there is a Prohibition, *in causa modi Decimandi*, when Lands are given in satisfaction of the Tythes.

2. As to the second Objection, It was Answered and Resolved, That that was from, or out of the Question; for *status Quæstionis non est deliberativus sed judicialis*: for convenient, or inconvenient, is not the Question, but what the Law is.

3. As to the third Objection, it was answered and resolved; First, That *satisfactio pecuniaria* of it self, is Temporal: But because the Parson hath not remedy, *pro modo Decimandi*, at Common Law, by force of the Acts cited before he might sue, *pro modo Decimandi*, in the Ecclesiastical Court: But that proves not, That if he sue for Tythes in Kind, which are utterly extinct, &c. that upon the Plea *de modo Decimandi*, that a Prohibition should not lye: for the contrary appears, without all question, by what hath been said before: See also 12 *H.* 7. 24. *b.* 39 *Ed.* 3. 22 *E.* 4. *Consultation.* 44.

As to the Objection, That Averment is taken of the Refusal of the Plea, of *Modus Decimandi*; It was answered and Resolved, That the same is of no force, for divers Causes.

1. It is onely to inforce the Contempt.

2. If the Spiritual Court ought to have the Tryal, *de modo Decimandi*, then the refusing to accept such a Plea, should give cause of Appeal not of Prohibition.

3. From the beginning of the Law, no Issue was ever taken upon the Refusal of the Plea, *in causa modi Decimandi*,

mandi, nor any Consultation granted to them; because they did not refuse, but allow the Plea.

4. The Refusal is no part of the matter issuable or material in the Plea; and therefore the *Modus Decimandi* is proved by two Witnesses, according to the Stat. 2 *E.* 6. *cap.* 13. and not the Refusal; which proves, the *Modus Decimandi* is onely the Matter of Suggestion, not the Refusal.

5. All the said five Matters of discharge of Tythes, mentioned in the said Act of 2 *Ed.* 6. ought to be proved by two Witnesses, and so have been always, since the making of the said Act. And therefore it clearly intended, that Prohibitions should be granted in such Cases.

6. Though they would allow, *bona fide de modo Decimandi*, without Refusal; yet if the Parson sue there for Tythes in Kind, when the *Modus* is proved, (the same being expressly forbidden by that Act 2 *Ed.* 6. 13.) a Prohibition lyes, though the *Modus* be Spiritual; as appears by the Book, 4 *E.* 4. 37.

45. Afterwards, the third day of the Debite of this Case before the King, Dr. *Bennet*, and Dr. *Martin*, had reserved divers Consultations granted *in causa modi Decimandi*, thinking they might work upon the King's Opinion: and thereupon they said, That Consultations were the Judgments of Courts had upon Deliberations; whereas Prohibitions were onely granted upon Surmises. And they shewed 4 Presidents.

1. One, where three joyntly sued a Prohibition, in the Case of *modo Decimandi*; and the Consultation saith, *Pro eo quod suggestio materiaque in eodem contenta minus sufficiens in lege existit, &c.*

2. Another, *in causa modi Decimandi*, to be paid to the Parson or Vicar.

3. Where the Parson sued for Tythes in Kind, and the Defendant alleadged, *modus Decimandi*, to be paid to the Vicar.

4. Where

4. Where the Parson Libelled for Tythe-Wooll, and the Defendant alleadged a Custom to reap Corn, and make it into Sheaves, and set forth the Tenth Sheave at his Charges: and so of Hay, to sever it from the New Cocks at his Charge, in full satisfaction of the Tythes of the Corn, Hay, and Wooll.

To which I answer'd, and humbly desir'd the King to observe, these were reserved for the last and center-point of their Proof. And herein these things may be observed,

1. That the Kings Courts do them Justice, when with their Consciences and Oaths they can.

2. That all the said Cases are clear, in the Judgment of those who are Learned in the Laws, that Consultation ought by the Law to be granted.

1. For as to the first President, the Case upon their own shewing, is, Three Persons joyned in one Prohibition, for three several parcels of Land, each having a several sort of Tything; and their Interests being several, they could not joyn; and therefore a Consultation was granted.

2. To the second, the manner of Tything was alleadged to be paid to the Parson or Vicar, which is uncertain.

3. To the third, The *Modus* never came in Debate; but whether the Tythes did belong to the Parson or Vicar: which being between two Spiritual Persons, the Ecclesiastical Court shall have Jurisdiction; and therewith agrees 38 *E.* 3. 6.

4. To the last, The same was upon the matter of a Custom of a *Modus Decimandi* for Wooll: for to pay the Tythe of Corn or Hay in Kind, in satisfaction of Corn, Hay, and Wooll, cannot be a satisfaction for the Wooll: for the other two were due of common right.

The Bishop of *London* answer'd, That the words of the Consultation were, *Quod suggestio prædicta materiaque in eadem*

eadem contenta minus sufficiens in lege existit, &c. So as *materia* cannot be referred to Form, and therefore it ought to extend to the *Modus Decimandi*.

46. To which I answer'd, That when the Matter is insufficiently or uncertainly alleadged, the Matter it self faileth; and though the Matter be in truth sufficient, yet if it were insufficiently alleadged, the Plea wanteth matter. Then the Lord Treasurer said, he wondered they would produce things that made more against them, then any thing had been said.

And when the King relyed, upon the Prohibition in the Register, when Land is given in discharge of Tythes, the Lord Chancellor said, *That was not like this Case*; For there by the Gift of the Land, the Tythes were discharged; but in the Case *de modo Decimandi*, an Annual Sum is paid; yet the Land remains charged, and is to be discharged by Plea, *de modo Decimandi*. All which I utterly denied: For the Land was as absolutely discharged of the Tythes, *in casu de modo Decimandi*, as where Lands are given. All which the King heard with patience, and the Chancellor answer'd no more.

After the King, with all his Councel, had for 3 dayes together, heard the Allegations on both sides, he said, He would maintain the Laws of *England*, and that his Judges should have as great respect from all his Subjects, as their Predecessors. And for the Matter, he said, for any thing had been said on the Clergies part, he was not satisfied; and advised Us the Judges to confer among our selves, and that nothing be encroached in the Ecclesiastical Jurisdiction, and they to keep within their Jurisdiction. And this was the end of these three dayes Consultation.

Note, Dr. *Bennet*, in his Discourse, inveighed much against the Opinion 8 *E.* 4. 14. and, in my Reports, in 2 *Co.* 45. *Wright's* Case, That the Ecclesiastical Judge would not allow a *Modus Decimandi*; and said, that was the Mistery of

of Iniquity, and they would allow it. The King asked for what cause it was so said in the said Books. To which I answer'd, That it appears in *Linwood*, who was Dean of the *Arches*, and a Profound Canonist, who wrote in *Henry* the Sixth's time, in his Title, *De decimis cap: Quoniam propter &c. fol.* 139. b. *Quod decimæ soluantur absq. ulla diminutione.* And in the Gloss it is said, *Quod consuetudo de non Decimando aut de non decimando non valet.* And that being written by so great a Canonist, was the cause of the said Saying in 8 *E.* 4. that they would not allow the said Plea *de modo decimandi*. And it seemed to the King, that that Book was a good cause for them in *Edward* the Fourth's time, to say as they had said. But I said, I did not rely thereon, but on the Grounds aforesaid.

Lastly, The King said, that the High Commission ought not to meddle with any thing, but that which is enormous, and which the Law cannot punish; as Heresie, Schism, Incest, and the like great Offences: And the King thought that two High-Commissions, for either Province one, should be sufficient for all *England*, and no more. 47.

Mich. 39 & 40 Eliz. *In the Kings-Bench*; Bedel *and* Sherman's *Case*. 47.

Mich. 39 & 40 *Eliz.* Which is entred, *Mich.* 40 *Eliz.* in the *Common-Pleas*, *Rot.* 699. *Cantabr.* the Case was this: *Robert Bedel* Gent. and *Sarah* his Wife, Farmers of the Rectory of *Litlington*, in the County of *Cambridge*, brought an Action of Debt against *John Sherman, incumbendia marischalli, &c.* and demanded 550 *l.* and declared, that the Master and Fellows of *Clare*-Hall in *Cambridge*, were seized of the said Rectory in Fee, in right of the said Colledge; and the 10 *Jun.* 29 *Eliz.* by Indenture

 &c.

demiſed to *Chriſtopher Pheſant* the ſaid Rectory for 21 years, rendring 17 *l.* 15 *s.* 5 *d.* and reſerving Rent-corn, according to the Statute, &c. which Rent was the antient Rent; who entred, and was poſſeſſed, and aſſigned all his Intereſt to one *Matthew Batts*, who made his laſt Will, and made *Sarah* his Wife Executrix, and dyed. *Sarah* proved the Will and entred, and was thereof poſſeſſed as Executrix, and took to Husband the ſaid *Robert Bedel*; by force whereof, they in right of the ſaid *Sarah* entred, and were poſſeſſed; and the Defendant was then Tenant, and ſeized for his life of 300 Acres of Arable Lands, in *Litlington* aforeſaid, which ought to pay Tythes to the Rector of *Litlington*: and in 38 *Eliz.* the Defendant *S minavit grano*, 200 Acres parcel, &c. the Tythes whereof amounted to 150 *l.* And the Defendant did not ſet forth the ſame from the Nine Parts, but carryed them away, contrary to the Statute 2 *E* 6. &c. 13. The Defendant pleaded, *Nihil debet*. And the Jury found, that the Defendant did owe 55 *l.* and to the reſt they found *Nihil debet*: And in Arreſt of Judgment, divers Matters were moved:

28.

1. That *Grano Seminata* is too general, and it ought to be expreſſed, with what kind of Grain the ſame was ſowed.

2. It was moved, If the Parſon ought to have the treble value, the Forfeiture being expreſly limited to none by the Act, or that the ſame belong to the Queen.

3. If the ſame belong to the Parſon, if he ought to ſue for it in the Eccleſiaſtical Court, or in the King's Temporal Court.

4. If the Husband and Wife ſhould joyn in the Action, or the Husband alone; and upon ſolemn Argument at the Barre and Bench, Judgment was affirmed.

Trin. 7 *Jac.* Regis. *In the* Court of Wards; *John Bayley's* Case. 48.

It was found by Writ of *Diem clauſit extremum*, that the ſaid *John Bayley* was ſeized of a Meſſuage, and of and in the 4th part of one Acre of Land, late parcel of the Demeſne Lands of the Mannor of *Newton* in the County of *Hereford*, in his Demeſne as of Fee, and found the other Points of the Writ; and it was holden by the two Chief Juſtices, and the Chief Baron.

1. That *Meſſuagium vel Tenementum* is uncertain; for *Tenementum* is *nomen collectivum*, and may contain Land, or any thing that is holden.

2. It was holden, That it was void for the whole, becauſe no Town is mentioned in the Office, where the Meſſuage or Tenement, &c. lyeth; and it was holden, that no *melius inquirendum* ſhall iſſue forth, becauſe the whole Office is incertain and void.

Trin. 7 *Jac.* Regis. *In the* Court of Wards. 48.

The Attorney of the *Court of Wards* moved the two Chief Juſtices, and the Chief Baron, in this Caſe: A man ſeized of Lands in Fee-ſimple, covenants for the advancement of his Son, and his Name, Blood, and Poſterity, that he will ſtand ſeized of them to the uſe of himſelf for life, and after to the uſe of his eldeſt Son, and to ſuch Woman as he ſhall marry, and the Heir-males of the body of the Son, and afterwards the Father dyeth, and after the Son takes a Wife and dyeth; if the Wife ſhall take an Eſtate for Life. And it was *Reſolved*, by the ſaid two Chief Juſtices, and Chief Baron, That the Wife ſhould take well enough; being within the

consideration, which was for the advancement of his Posterity; and without a Wife the Son cannot have Posterity. Secondly, It was Resolved, that the Estate of the Son shall support the use to the Defendant; and when the Contingent happeneth, the Estate of the Son shall be changed, according to the Limitation, *viz.* to the Son and the Woman, and the Heirs of the Body of the Son. And so it was Resolved in the Kings-Bench, by *Popham* Chief Justice, and the whole Court, in *Sheffields* Case, in Q. *Elizabeths* time.

Trin. 7 *Jac.* Regis. *In the* Court of Wards:
Spary's *Case.*

49.

John Spary seized in Fee, in the Right of his Wife, of Lands holden by Knight-service, had Issue by her, and 22 *Dec.* 9 *Eliz.* alienated to *Edward* Lord *Stafford*: The Wife dyed, the Issue of full age; the Alienee holds the Lands. And 10 years after the Fathers death, and 12 years after the Mothers, Office is found, 7 *Jac.* finding all the special Matter after the Mothers death. The Question was; Whether the mean Profits are to be answer'd to the King: And it was Resolved, by the two Chief Justices, and Chief Baron, that the King should have the mean Profits, because the Alienee was in by Title: and untill Entry, the Heir has no Remedy for the mean Profits, but that the King might seize and make Livery, because the Entry of the Heir is lawful by the Stat. 32 *H.* 8. *c.* 28.

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49. Trin. 7 *Jac.* Regis. *In the* Court of Wards.

It was found by force of a *Mandamus* at *Kendal* in *Westmerland*, 21 *Dec.* 6 *Jac.* that *George* Earl of *Cumberland*, long before his death, was seized in Tail to him, and to the

the Heirs-male of his body, of the Caſtles and Mannors of *Browham*, *Appleby*, &c. the remainder to Sir *Ingram Clifford*, with divers Remainders in Tail; the remainder to the right Heirs of *Henry* Earl of *Cumberland*, Father of the ſaid *George*: and that the ſaid *George* Earl ſo ſeized, by Fine and Recovery, conveyed them to the uſe of himſelf, and *Margaret* his Wife, for their Lives, for the Joynture of *Margaret*; and after, to the Heir-males of the body of *George* Earl of *Cumberland*; and for want of ſuch Iſſue, to the uſe of *Francis*, now Earl of *Cumberland*, and the Heir-males of his body; and for want of ſuch Iſſue, to the uſe of the right Heirs of the ſaid *George*: And after, by another Indenture, conveyed the Fee-ſimple to *Francis*, Earl. By force of which, and of the Statute of Uſes, they were ſeized accordingly; and afterwards, the 30 of *Octob.* 3 *Jac. George* Earl of *Cumberland* dies, without Heirs male of his body, &c. And found further, that *Margaret*, Counteſs of *Cumberland*, that now is, was alive, and took the profits of the Premiſſes, from the death of the ſaid *George*, Earl, till the taking the Inquiſition; and further found the other Points of the Writ.

1. And firſt, it was objected, Here was no dying ſeized found by Office, and therefore the Office ſhall be inſufficient: But to that, it was Reſolved, That by this Office the King was not intitled by the Common-Law; for then a dying ſeized was neceſſary: But this Office is to be maintained upon the Stat. 32 and 34 *H.* 8. by force of which no dying ſeized is neceſſary; and ſo it was Reſolved in *Vincents* Caſe, *Anno* 23 *Eliz.* 50.

2. The ſecond Objection was, It doth not appear that the Wives Eſtate continued in her till the Earles death; for the Husband and Wife had aliened the ſame to another, and then no primer ſeizin ſhall be, as is agreed in *Ringhams* Caſe. And to that it was Reſolved, That the Office was ſufficient, *prima facie*, for the King, becauſe it is a thing collateral, and no point of the Writ: And if

such Alienation be, the same shall come in of the other part of the Alienee, by a *Monstrans de droit*. And the Case at Bar is a stronger Case, because it is found, the Countess took the Profits from the death of *George* the Earl, till the finding the Office.

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50. Trin. 7 *Jac.* Regis. *In the Court of Wards*; Wills *Case*.

Henry Wills seized of the 4th Part of the Mannor of *Wylland*, in the County of *Devon*, holden of Q. *Eliz.* in Socage Tenure *in capite*, of the said 4 h part, enfeoffed *Zachary Irish*, and others, and their Heirs, to the use of the said *Henry* for his Life; and after his Decease to *Thomas Wills* his second Son in Tail, and after to the use of *Richard Wills*, his youngest Son in Tail; and after the said *Henry* so seized as aforesaid, dyed. All this Matter is found by Office. And the Question was, If the King ought to have primer seizin in this Case, that Livery and *Ouster le mayne* should be sued by the Statutes of the 32 and 34 *H.* 8. And it was Resolved by the two Chief Justices, and the Chief Baron, that not; if in this Case by the Common-Law no Livery or *Ouster le main* shall be sued, and that was agreed by them all, by the experience and course of the court. See 21 *Eliz. Dyer* 362. and 4 *Eliz. Dyer* 213.

51. And two Presidents were shewed, which were Decreed in the same Court, by the Advice of the Justices, Assistants to the Court.

One in *Trin.* 16 *Eliz. Thomas Stavely* enfeoffed, *William Stavely* and *Thomas Law*, of the Mannor of *Rydly* in *Nottinghamshire* on condition, that they re-enfeoffe the Feoffor and his Wife for their Lives; the remainder to *Thomas Stavely*, Son and Heir apparent of the Feoffer in Fee: Which Mannor was holden of Q. *Elizabeth*, in Socage Tenure

Tenure in *capite*; And it was Resolved, That no Livery or *Ouster le maine*, shall be sued in such Case, because of the saving of the Stat. 32 *H.* 8. The words whereof are, Saving &c. to the King &c. all his Right &c. of *primer seizin*, and relief &c. for Tenure in Socage, or of the nature of Tenure in Socage in chief, as heretofore hath bin used: But there was no Custom before the Act for the King to have *primer seizin*, &c.

Another President was in *Pasch.* 37 *Eliz.* in the Book of *Orders*, *fol.* 444. where the Case was, That *William Allet* was seized of certain Lands in *Prisey*, called *Lundsey*, holden of the Queen in Socage Tenure in chief; and by Deed covenanted to stand seized to the use of his wife for life, and afterwards to the use of *Richard* his younger Son in Fee, and dyed, and all was found by Office; and it was Resolved *ut supra*. But the Doubt of the Case at Bar was, because *Henry* the Feoffor had a Reversion in Fee, which descended to the said *William* his eldest Son.

Trin. 7 *Jacobi* Regis. *The Case of the Admiralty.* 51.

A Bill was preferred in the *Star-Chamber* against Sir *Richard Hawkins*, Vice-Admiral of the County of *Devon*, and was charged, that one *William Hull*, and others, were notorious Pyrates upon the High Seas, and shewed in certain what Pyracy they had committed: That the said Sir *Richard Hawkins* knowing the same, did receive them, and abet, & comfort them, and for Bribes suffered them to be discharged: And what Offence that was, the Court referred to the consideration of the two Chief Justices, and Chief Baron, who heard Councel of both sides divers days at *Sergeants* Inne: And it was Resolved by them,

1. That the Admirals, by the Common-Law, ought not to meddle with any thing done within the Realm, but onely with things done upon the Sea: and that appeareth fully by the 13 *R.*2 *cap.*5. and therewith agrees 2 *H.*4. *c.*11. and 15 *R.*2. *c.*3. So also 2 *H.*5. *c.*6. 5 *Eliz. c.* 5. and this agrees with *Stamf. fol.* 51. 8 *Ed.*2. *Coron.* 399. See *Plo. Com.* 37 *b.* 2 *R.*3.12. 30 *H.* 6. *f.* by *Prisoit.*

52. 2. It was Resolved, That the Statutes are to be intended of a Power to hold Plea, not of a Power to award Execution: for notwithstanding the said Statutes, the Judge of the Admiralty may do Execution within the Body of the County: And theretore 19 *H.*6 7 the Case was *W. T.* at *Southwark*, affirmed a Plaint of Trespals in the Admiralty against *J. B.* of a Trespass done upon the High-Sea: Whereupon *J. B.* was cited to appear at the common day next ensuing; at which day, the said *J. B.* made default: And according to the usage of the Court, the said *J. B.* was amerced to 20 Marks: Whereupon Command was made to P. as Minister of the said Court, to take the Goods of the said J. B. to make agreement with the aforesaid W. T. by force of which, he, for the said 20 Marks, took 5 Cowes, and 100 Sheep, in Execution for the said Money, in the County of *Leicester*. And there it is holden by *Newton*, and the whole Court, That the Statutes restrain the power of the Court of Admiralty, to hold Plea of a thing done within the body of the County; but they do not restrain the Execution of the same Court to be served upon the Lands. In which Case, these Points were Resolved,

53. 1. That though the Court of Admiralty is not a Court of Record (see *Brooks Error.* 77. *acc.*) yet by Custom of the Court they may amerce the Defendant for his default, by their discretion.

2. That they may make Execution for the same, of the Goods of the Defendant, *in corpore Comitatus*; and if he have not Goods, may arrest his Body.

But

But the great question between them was, If a man commit Pyracy upon the Sea, and one knowing thereof, receive and comfort the Defendant in the Body of the County, if the Admiral, and other the Commissioners by the Act 28 H. 8. *cap.* 16. may proceed by Indictment and Conviction against the Receiver and Abetter, the Offence of the Accessary having his beginning within the Body of the County. And it was Resolved by them, That such a Receiver and an Abetter, by the Common-Law, could not be indicted and convicted; because the Common-Law cannot take Cognizance of the Original Offence, being done out of the Jurisdiction of the Common-Law; and where it cannot punish the Principal, it cannot punish the Accessary: And therefore *Coke* Chief Justice reported to them a Case which was in *Suffolk*, 28 *Eliz.* where *Butler* and others, upon the Sea, next to the Town of *Layston*, robbed divers of the Queens Subjects of their Goods, which they brought into *Norfolk*, and there were apprehended and brought before Me, then a Justice of Peace in the same County, and upon Examination, they confessed a cruel and barbarous Pyracy, and that the Goods then in their Custody, were part of the Goods which they had so robbed: And I was of Opinion, that in that Case it could not be Felony punishable by the Common-Law, because the Original Act was not Offence, whereof the Common-Law taketh knowledge; and then the bringing them into the County, could not make the same Felony punishable by our Law: Yet I committed them to the Gaol, untill the coming of the Justices of the Assizes: And at the next Assizes, the Opinion of *Wray* Chief Justice, and *Periam* Justices of Assize, was, agreeing with Me *ut supra*: and thereupon they were committed to Sir *Robert Southwel*, then Vice-Admiral for those Counties: and this, in effect, agrees with *Lacies* Case: which see in my Reports cited in *Bingham's* Case, 2 *Rep.* 93. and in *Constables* Case, *C.* 5. *Rep.* 107. 15.

See,

See, Pyracy was Felony, 40 *Aſſ.* 25. by *Schard*, where a Captain of a Ship, with ſome *Engliſh*-men, robb'd the Kings Subjects upon the High-Seas; and he ſaith, 'twas Felony in the *Norman* Captain, and Treaſon in the *Engliſh*-men, which is to be underſtood of Petit-Treaſon: and therefore in that Caſe, the Pyrates being taken, the *Norman* Captain was hang'd, and the *Engliſh* drawn & hang'd; as appears by the ſame Book. See *Stamford* 10.

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54. Trin. 7 *Jac.* Regis; *In the Common-Pleas*, Pettus and Godſalve's *Caſe*.

In a Fine levyed, *Trinity* Term, *Anno quinto* of this King, between *John Pettus* Eſq; Plaintiff, and *Richard Godſalve*, and others, Deforceants of the Mannor of *Caſtre*, &c. in *Norfolk*, where in the third Proclamation, upon the Foot of the Fine, the ſaid Proclamation is ſaid to be made in the ſixth year of the King that now is, which ought to have been *Anno quinto*: And the fourth Proclamation is altogether left out; becauſe upon view of the Proclamations upon *Dorſis* upon Record, not *Finis ejuſdem Termini per Juſticiarios*, remaining with the *Chirographer*, &c. it appeareth, the ſaid Proclamations were duly made: therefore it was adjudged, that the Errours aforeſaid ſhould be amended and made to agree, as well with the Proclamation, upon Record of the Fine, and Entry of the Book, as with the other Proclamations in *Dorſo*, &c. And this was done, upon the Motion of *Haughton* Sergeant.

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54. Mich. 7 *Jac.* Regis. *In the Court of Wards*, Samme's *Caſe*.

John Samme's being ſeized of *Gravy* Mead, by Copy of Court-Roll, of the Mannor of *Tollesham* the Great; of which

which Sir *Thomas Beckingham*, &c. and held the same of the King by Knights Service *in capite*: Sir *Thomas* by Deed indented, dated 22 *Decemb.* 1 *Jacobi*, between him of the one part, and *John Sammes* and *George Sammes*, Son and Heir of *John*, on the other part, did bargain, sell, enfeoffe, &c. to *John Sammes*, the said Mead, called *Gray* Mead, to hold to the said *John Sammes*, and *George Sams*, and their Heirs and Assigns, to the onely use of the said *John* and *George*, and their Heirs and Assigns for ever: and Sir *Thomas*, by the same Indenture, covenants, to make further Assurance to the said *John* and *George*, &c. and Livery and Seizin was deliver'd accordingly.

John Sammes the Father dyeth, *George Sammes* his Son and Heir within Age; the Question was, Whether *Geo. Sammes* should be in Ward to the King, or no: And in this Case three Points were Resolved, 55.

1. Forasmuch, as *George* was not named in the Premisses, he cannot take by the *Habendum*; and the Livery, according to the Indenture, gives nothing to *George*, it being to him as void: but though the Feoffment be good onely to *John* and his Heirs, yet the use limited to *John* and *George*, and their Heirs, is good.

2. If the Estate had been conveyed to *John* and his Heirs, by the Release, &c. as it may well be to a Tenant by Copy of Court Roll, the use limited to them is good.

3. But the third was of greater doubt, If in this Case the Father and Son were Joint-Tenants, or Tenants in Common: And it was Resolved, That they were Joint-Tenants, and that the Son in the Case at Bar should have the said *Grange* by the Survivor: for if at the Common-Law *A.* had been enfeoffed, to the use of him & B. and their Heirs, though that he was onely seized of the Land, the use was jointly to A. and B. for a use shall not be suspended or extinct by a sole Seizin, or joint Seizin of the Land: and therefore, if A. and B. be enfeoffed to the use of

of A. and his Heirs; And A. dyeth, the entire use shall descend to his Heirs; as appears 13 *H.* 7. 6. in *Stoner's* Case; and by the Statute of 27 *H.* 8. *cap.* 10. Of Uses.

And when it was said, that the Estate of the Land which the Father hath in it, as to the moiety of the use, which he himself hath, shall not be devested out of him. To that it was Answered and Resolved, That, that shall well be: for if a man make a Feoffment in Fee to one, to the use of him and the Heirs of his body, in this Case, for the benefit of the Issue, the *Statute of uses* devests the Estate vested in him by Common-Law, and executes the same in himself by force of the Statute: And it is to be known, that an Use of Land (which is but a pernency of Profits) is no new thing, but part of that which the Owner of the Land had: and therefore if Tenant in *Borough-English*, or a man seized on the part of his Mother, make a Feoffment to another without consideration, the younger Son in the one case, and the Heir, on the part of the Mother, on the other, shall have the use, as they should have the Land it self, if no Feoffment had been made; as it is holden 5 *E.* 4. 7. See 4 and 5 *P.* and *M. Dyer* 163. See *Fenwick* and *Milford's* Case, *Trin.* 31 *Eliz.* So in 28 *H.* 8. *Dyer* 11. the Lord *Hoffes* Case, 13 *H.* 7. 6. by *Butler*.

56. So in the Case at Bar, the Use limited to the Feoffee, and another, is not any new thing, but the pernancy of the old profits of the Land, which may well be limited to the Feoffee and another jointly. But if the use had been onely limited to the Feoffee and his Heirs there, because there is not any Limitation to another person, *nec in præsenti nec in futuro*, he shall be in by force of the Feoffment.

And it was Resolved, That Joint-Tenants might be seized to an use, though they come to it at several times: as if a man make a Feoffment in Fee to the use of himself, and to such a Woman which he shall after marry, for

for term of their lives, or in tail, or in fee; in this Case, if he marry a Wife after, she shall take jointly with him, though they take the use at several times. See 17 *Eliz. Dyer* 340. but otherwise it is of Estates, which pass by the Common-Law; as 24 *Ed.* 3. *Joynder in Action* 10. If a Grant be made by Deed to one man for life, the remainder to the right Heirs of A. and B. in Fee, and A. hath Issue and dyeth, and afterwards B. hath Issue and dyeth, and then Tenant for Life dyeth; in that case, the Heirs of A. and B. are not Joynt-Tenants; because by the death of A. the remainder, as to one moiety, vested in his Heir, and by the death of B. the other moiety vested in his Heir at several times.

And upon the whole matter, it was Resolved, That because in the principal Use, the Father and Son were Joint-Tenants by the Original Purchase, that the Sonne having the Land by Survivor, should not be in Ward, and accordingly it was so Decreed. 57.

Pasch. 39 *Eliz. Rot.* 233. *In the* Kings-Bench, *Collins* and *Harding's* Case. 57.

The Case was; A man seized of Lands in Fee; and also of Lands, by Copy of Court-Roll in Fee, according to the Custom of the Mannor, made one intire Demise of the Lands in Fee, and of the Lands holden by Copy, according to the Custom to *Harding* for years, rendring one intire Rent, and afterwards the Lessor surrendred the Copy-hold Land to the use of *Collins* and his Heirs: and at another time granted by Deed the Reversion of the Free-hold Lands to *Collins* in Fee, and *Harding* attorned: and afterwards, for the Rent behind, *Collins* brought an Action of Debt for the whole Rent: And it was objected, That the reservation of the Rent was an entire Contract; and, by the Act of the Lessee, the same cannot

cannot be apportioned: and therefore if one demise 3 Acres, rendring 3 s. Rent, and afterwards bargains and sells the reversion of one Acre, the whole Rent is gone, because the Contract is entire, &c. Also the Lessee by that shall be subject to two Fealties, where he was subject but to one before.

To these Points, it was answered and Resolved, That the Contract was not entire, but that the same by Act of the Lessor, and Consent of the Lessee, might be divided and severed; for the Rent is incident to the Reversion, and the Reversion is severable, and by consequence the Rent also: for *accessorium sequitur naturam sui principalis*. And as to the two Fealties, so that the Lessee shall be subject, though the Rent shall be extinct; for Fealty is by necessity of Law incident to the Reversion; but the Rent shall be divided, *pro rata portionis*, and so it was adjudged.

58. And it was also adjudged, That though *Collins* come to the Reversion by several Conveyances, and at severall times, yet he might bring an Action of Debt for the whole Rent. *Hill.* 43 *Eliz. Rot.* 243. *West* and *Lassels* Case. So *Hil.* 42 *Eliz. Rot.* 108. in the *Common-Pleas*, *Ewer* and *Moyles* Case.

58 *Note*, It was adjudged, 19 *Eliz.* in the *Kings-Bench*, that where one obtained a Prohibition upon Prescription, *de modo Decimandi*, by payment of a sum of money, at a certain day, upon which Issue was taken, and the Jury found the *modus Decimandi* by payment of the said sum; but at another day, the Case being well debated; at last, it was Resolved, That no Consultation should be granted, for though the day of payment may be mistaken, yet a Consultation shall not be granted where the Spiritual Court hath not Jurisdiction of the Cause. *Tanfield* Chief Baron hath the Report of this Cause.

Mich

Mich. 7 *Jac.* Regis. 58.

In an *Ejectione Firmæ*, the Writ and Declaration were of two parts of certain Lands in *Hetherſet* and *Windham*, in the County of *Norfolk*; and ſaith, not in two parts, in three parts to be divided: and yet it was good as well in the Declaration as the Writ: for without queſtion the Writ is good, *de duabus partibus*, generally, and ſo is the Regiſter. See the 4 *E.* 3. 162. 2 *E.* 3. 31. 2 *Aſs.* 1. 10 *Aſs.* 12. 10 *E.* 3. 511. 11 *Aſs.* 21. 11 *E.* 3. *Brc.* 478. 9 *H.* 6. 36. 17 *E.* 4. 46. 19 *E.* 3. *Brc.* 244. And upon all the ſaid Books it appears, that by the Intendment and Conſtruction of the Law, when any parts are demanded, without ſhewing in how many parts the whole is divided, that there remains but one part undivided. But when any Demand is of other parts in other form, there he ought to ſhew the ſame ſpecially. And according to this difference, it was reſolved in *Jordan's* Caſe in the *Kings-Bench*; and accordingly Judgment was given this Term in the Caſe at Bar.

Mich. 7 *Jac.* Regis; *In the* Common-Pleas, *Mutton's* Caſe. 59.

An Action upon the Caſe was brought againſt *Mutton*, for calling the Plaintiff *Sorcerer* and *Inchanter*, who pleaded *Not Guilty*; and it was found againſt him to the Damage of ſix pence. And it was holden by the whole Court in the *Common Pleas*, that no Action lyes for the ſaid words: for *Sortilegus eſt qui per ſortes futura prænunciat.* Inchantry is *verbis aut rebus adjunctis aliquid præter naturam moliri.* See 45 *Ed.* 3. 17. One was taken in *Southwark*, with the Head and Viſage of a dead man, and with

a Book of Sorcery in his Mayl; and he was brought into the *Kings-Bench* before *Knevet* Justice, but no Indictment was framed against him; for which the Clerks made him swear never after to commit Sorcery, and he was sent to Prison; and the Head and Book were burn'd at *Tuthil* at the Prisoners charges.

The antient Law was, as by *Britton* appears, that who were attainted of Sorcery were burned; but the Law at this day is, they shall only be fined and imprisoned. So if one call another Witch, an Action will not lye: But if one say, *She is a Witch, and hath bewitch'd such a one to death*, an Action upon the Case lyes, if in truth the party be dead. *Conjuration*, in the Stat. 5 *Eliz. cap.* 16. is taken for Invocation of any evil and wicked Spirits, and the same by that Act is made Felony: But Witchcraft, Inchantment, Charms, or Sorcery, is not Felony, if not by them any person be killed or dyeth.

The first Statute made against *Conjuration*, *Witchcraft*, &c. was the Act 33 *H.* 8. *c.* 8. and by it they were Felony in certain Cases special; but that was repealed by the 1 *Ed.* 6. *c.* 12.

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60. Mich. 7 *Jac.* Regis. *In the* Court of Wards, *Sir* Allen Percy's *Case*.

Sir *John Fitz*, and *Bridget* his Wife, being Tenants for life, of a Tenement called *Ramshams*, the remainder to Sir *John Fitz* in Tail, the remainder to *Bridget* in Tail, the reversion to Sir *John* and his Heirs: Sir *John*, and *Bridget* his Wife, by Indenture demised the said Tenement to *William Sprey* for divers years yet to come (except all Trees of Timber, Oakes and Ashes, and liberty to carry them away) rendring Rent. And afterwards Sir *John* dyed, having Issue *Mary* his Daughter, now Wife of Sir *Allen Percy* Knight; and afterwards the said

said *William Sprey* demised the same Tenement to Sir *Allen* for 7 years. The Question was, Whether Sir *Allen* having the immediate Inheritance in right of his Wife, expectant upon the Estate for the life of *Bridget*; and also having the Possession of the said Demise, might cut down the Timber-Trees, Oakes, and Ashes? And it was objected, he might well do it: for it was Resolved in *Sanders* Case, in the 5th Part of my Reports, That if Lessee for years or life, assigns over his term or Estate to another, excepting the Mines or the Trees, &c. that the Exception is void. But it was answered and Resolved, by the two Chief Justices, and the Chief Baron, that in the Case at Bar, the Exception was good without question; because he who hath the Inheritance, joyns in the Lease with the Lessee for life. And it was further Resolved, That if Tenant for life Leaseth for years, excepting the Timber Trees, the same is lawfully and wisely done; for otherwise, if the Lessee or Assignee cut down the Trees, the Tenant for Life should be punished in Wast, and should not have any remedy against the Lessee for years. But when Tenant for life upon his Lease excepteth the Trees, if they be cut down by the Lessor, the Lessee or Assignee shall have an Action of Trespass; *Quare vi & armis*, and shall recover Damages according to his loss. And this Case is not like the Case of *Sanders*; for there the Lessee assigned over his whole Interest, and therefore could not except the Mines, Trees, &c. But when Tenant for life leases for years, except the Timber Trees, the same remaineth yet annexed to his Free-hold, and he may command the Lessee to take them for necessary Reparations of his Houses. And in the said Case of *Sanders*, a Judgment is cited between *Foster* and *Miles* Plaintiffs, and *Spencer* and *Bourd* Defendants; That where Lessee for years assigns over his Term, except the Trees, that Wast in such Case shall be brought against the Assignee: But in this Case, without question, Wast lyeth against Tenant for life, and so there is a difference.

61. Mich. 7 Jac. Regis. *In the Court of Wards*; Hulme's *Case*.

The King (in Right of his Dutchy of *Lancaster*) Lord; *Richard Hulme* (seized of the Mannor of *Male*, in the County of *Lancaster*, holden of the King as of his Dutchy by Knights Service) *Mesne*, and *Robert Male* (seized of Lands in *Male* holden of the *Mesne*, as of the said Mannor by Knights Service) Tenant: *Richard Hulme* dyed; after whose death 31 H. 8. it was found, that he dyed seized of the said Mesnalty; and that the same descended to *Edward* his Son and Heir within Age, and found the Tenure aforesaid &c. And during nonage, *Robert Male* dyed seized of the said Tenancy peravail, and that the same descended to *Richard* his Son and Heir (as was found by Office 25 H.8.) within age; and that the said Tenancy was holden of the King, as of his said Dutchy, by Knights Service; whereas in truth the same was holden of *Edward Hulme*, then in Ward of the King, as of his Mesnalty, for which the King seized the Ward of the Heir of the Tenant. And afterwards, *Anno quarto* Jacobi *Regis nunc*, after the death of *Richard Male*, the lineal Heir of *Robert Male* by another Office it was found, that *Richard* dyed seized of the Tenancy, and held the same of the King, as of his Dutchy, &c his Heir within age: Whereupon *Richard Hulme*, Cozen and Heir of the said *Richard Hulme*, preferred a Bill to be admitted, to traverse the Office found 4 *Jac Regis*. And the Question was, Whether the Office found 35 H.8. be any Estoppel to the said *Hulme*? or if that the said *Hulme* should be first driven to Traverse that.

And it was objected, That he ought first to traverse the Office of 35 H.8. as in the Case 26 *E.* 3. 65. And that the first Office shall stand as long as the same remaines in force.

To

To which it was Answered and Resolved, by the two Chief Justices, and Chief Baron, and Court of Wards; That the finding of an Office is not any Estoppel, for that is but an Inquest of Office, and the party grieved shall have a Traverse to it: But when an Office is found falsly, that Land is holden of the King by Knights Service *in capite*, or of the King himself in Socage, if the Heir sueth a general Livery, it is holden 46 *Ed.* 3. 12. by *Mowbray* and *Percy*, that he shall not after adde, that the Land is not holden of the King: But that is not any Estoppel to the Heir himself, and shall not conclude his Heir: for so saith *Mowbray* himself expressly, 44 *Ass. pl.* 35. See 1 H. 4. 6. *b.* So 33 H. 6. 7. And there is no Book that saith, that the Estoppel shall endure longer than his life; but that is to be intended of a general Livery; but a special Livery shall not conclude one. And if a Jury find falsly in a Tenure of the King, the Lord, of whom the Land is holden, may traverse that Office. Or if Land be holden of the King in Socage, &c. the Heir may traverse the last Office; for by that he is grieved, and he shall not be driven to traverse the first Office. And when the Father sues Livery and dyes, the Conclusion is executed, and past, as is aforesaid.

And note, there is a special Livery, but that proceeds of the King's Grace, and is not the Suit of the Heir; and the King may grant it either at full age, before *ætate probanda*, or to the Heir within age, as appears 21 *E.* 3. 40. And that is general, and shall not comprehend any Tenure, as the several Livery doth; and therefore it is not any Estoppel without question: See the 33 H. 8. *cap.* 22. 23 *Eliz. Dyer* 177. 62.

It was also Resolved in this Case, that the Office of 35 H. 8. was not traversable; for his own Traverse shall prove, that the King had cause to have Wardship by reason of Ward. And when the King comes to the Possession by a false Office, or otherwise, if it appears the 63.

King have any other Right to have the Land there, none ſhall traverſe the Office or Title of the King; becauſe the Judgment in the Traverſe is, *Ideo conſideratum eſt, quod manus Domini Regis amoveantur*, &c. See 4 H. 4. *fol.* 33. in the Earl of *Kents* Caſe, &c.

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63. Mich. 7 *Jacobi* Regis.

Note, The Priviledge, Order, or Cuſtom of Parliament, either of the Upper-Houſe, or Houſe of Commons, belongs to the Determination of the Court of Parliament; and this appeareth by two notable Preſidents:

1. The one at the Parliament holden in the 27 H. 6. There was a Controverſie moved in the Upper-Houſe, between the Earles of *Arundel* and *Devonſhire*, for their Seat, Places, and Pre-eminences of the ſame to be had in the King's, Preſence, as well in Parliament, as in Councels, and elſewhere: The King, by the Advice of Lords Spiritual and Temporal, committed the ſame to certain Lords of Parliament, who not having leiſure to examine the ſame, by the ſaid Lords Advice, referred it to the Judges of the Land, to hear, ſee, and examine the Title, &c. and to report what they conceive herein. The Judges reported as followeth: That this matter (*viz.* of Honour and Pre-eminency between the two Earles, Lords of Parliament) was a matter of Parliament, and belonged to the King and his Lords in Parliament to be decided: Yet being ſo commanded, they ſhewed what they found upon Examination, and their Opinions thereon.

Another Parliament, 31 H. 6. 6th of *March* begun, and after ſome continuance, was prorogued to the 14 of *February*; and afterwards in *Michaelmas* Term, the ſame 31 H. 6. *Thomas Thorpe*, Speaker of the Commons Houſe, was condemned in the *Exchequer*, in 1000 *l.* Damages, at the Duke of *Buckingham's* Suit, for a Treſpaſs done to him

him. The 14th of *Feb.* the Commons moved in the Upper-House, that their Speaker might be set at liberty, to exercise his Place, &c. The Lords refer it to the Judges, and *Fortiscue* and *Prisot*, the two Chief Justices, in the Name of all the Judges, answer'd, That they ought not to consider this Question, &c. but it belongeth to the Lords of the Parliament, and not to the Justices. But as to their Proceedings in the Lower Courts, in such Cases, they deliver'd their Opinions. See 12 *E.* 4. 2.

Hill. 7 *Jac.* Regis. *In* Cam. *Stell.* Heyward *and Sir* John Whitbrook's *Case*. 64.

In the Case betwe n Heyward and Sir *John Whitbrook*, in the *Star-Chamber*, the Defendant was convicted of divers Misdemeanours, and Fine and Imprisonment imposed on him, and Damages to the Plaintiff. And it was moved, that a special Process might be made out of that Court, to levy the said Damages, upon the Lands and Goods of the said Defendant. And it was referred to the two Chief Justices, whether any such Process might be made; who this Term moved the Case to the Chief Baron, and the rest of the Judges and Barons; and it was unanimously by them all Resolved, That no such Process could or ought to be made, neither for the Damages, nor for the Costs given to the Plaintiff, the Court having no such power, but only to keep the Defendant in Prison till he pay them. For, for a Fine due to the King, they can make no Process to levy it; but they estreat it into the *Exchequer*, which hath power by Law to write forth Process, &c. But if a man be convict in the *Star-Chamber* for Forgery, upon the Stat. 5 *Eliz.* c. 14. In that Case, for the double Costs and Damages, an *English* Writ shall be made, directed to the Sheriff, &c. reciting the Conviction, and Statute for levying the said Costs and Damages,

&c. and to bring the money into *Star-Chamber*, and the Writ shall be sealed with the Great Seal, and the Teste of the King. The like Resolution was in *Langdale*'s Case in that Court.

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65. Hill. 7 *Jac.* Regis. In the *Common-Pleas*, Morse and Webb's *Case*.

In a *Replevin* brought by *John Morse*, against *Robert Webb*, of the taking of two Oxen the last day of *Novemb.* 3 *Jac. regis nunc*, in a place called the *Downfield* in *Luddington*, in the County of *Worcester*; The Defendant, as Bayliff to *William Sherington* Gent. made Conuzance, because the place where, is an Acre of Land, which is the Freehold of the said *William Sherrington*, and for Damage feasants, &c. In Bar of which Avowry, the Plaintiff said, That the said Acre of Land is parcel of *Downfield*, and that he himself, at the time and before the taking &c. was, and is yet seized of two Yard-Land, with the Appurtenances, in *Luddington*; and that he, and all those whose Estate he hath in the said 2 Yard-Land, time out of mind, &c. have used to have Common of Pasture, *per totam contentam*, of the said Place called the *Downfield*; whereof &c. for 4 Beasts called *Rother*-Beasts, and two Beasts called *Horse*-Beasts, and for 60 Sheep, at certain times in the Year, &c. And that he put in the said two Oxen to use his Common, &c. And the Defendant maintained his Avowry, and traversed the Prescription, upon which the Parties were at Issue, and the Jury found a special Verdict: That before the taking one *Richard Morse*, Father of the said *John Morse* now Plaintiff, whose Heir he is, was seized of the said two Yard-Land, and had Common of Pasture, &c. as is before alleadged, and so seized the said *Richard Morse*, 20 *Eliz.* demised to *William Thomas*, and *John Fisher*, divers parcels of the said

two

two Yard-Land; to which &c. *viz.* the four Butts of Arable, with the Common and Inter-Common to the ſame belonging, for 400 years: By force whereof the ſaid *William Thomas*, and *John Fiſher*, entred &c. to the ſaid dyed: whereby the Poſſeſſion and Reverſion of the ſaid two Yard-Land deſcended to *John Morſe* now Plaintiff. And if upon the whole Matter *John Morſe* now hath, and at the time of the taking, &c. had Common or Paſture, &c. for &c. as to the ſaid two Acres of Land, with the Appurtenances, in Law or not, the Jury pray the Advice of the Court.

Note, This Plea began *Trin.* 5 *Jac. Rot.* 1405. and upon Argument at the Bar and Bench,

1. It was Reſolved, by the whole Court, That it ought to be found againſt the Defendant, who had traverſed the Preſcription: For though all the two Yard-Lands had been demiſed for years, yet the Preſcription made by the Plaintiff is true: But if he would take advantage of the matter in Law, he ought (confeſſing the Common) to have pleaded the ſaid Leaſe; but when he traverſeth the Preſcription, he cannot give the ſame in Evidence. 66.

2. Reſolved, That if the ſaid Leaſe had been pleaded, that the Common, during the Leaſe for years, is not ſuſpended or diſcharged; for each of them ſhall have Common rateable, and in ſuch manner, that the Land in which &c. ſhall not be ſurcharged.

3. Reſolved, That Common appendant to Land, is as much as to ſay for Cattel levant and couchant upon the Land, in which &c.

4. There is no difference, when the Preſcription is for Cattel levant and couchant, and for a certain number of Cattel levant and couchant: But when the Preſcription is for Common appurtenant to Land, there a certain number of the Cattel ought to be expreſſed, which are intended by the Law to be levant and couchant.

66. Hill. 7 *Jac.* Regis. *In the* Common-Pleas; Hughes *and* Crowther's *Case*.

In a *Replevin* between *Robert Hughes* Plaintiff, and *Richard Crowther* Defendant, which began *Trin.* 6. *Jac. Rot.* 2220. The Case was, *Charles Fox* was seized of 6 Acres of Meadow in *Bedston*, in the County of *Salop*, in Fee, and 10 *Octob.* 9 *Eliz.* leased the same to *Charles Hibbens*, and *Arthur Hibbens*, for 60 years, if the said *Charles* and *Arthur* should so long live, and afterwards *Charles* dyed; and if the Lease determine by his death, was the Question. And it was adjudged, That by his death, the Lease was determined: For the life of a man is meer collaterall unto the Estate for years; otherwise, if a Lease be made to for the Lives of J. S. and J. N. See *Frudnel's* Case in the 5th Part of my Reports; which Case was affirmed for good Law by the whole Court.

67. Pasch. 8 *Jac.* Regis. In *Communi Banco*; Heydon *and* Smith's *Case*.

Richard Heydon brought an Action of Trespass against *Michael Smith*, and others, of breaking his Close called the *Moor* in *Ugley*, in the County of *Essex*, the 25 day of *June*, 5 *Jac. Et quandam arborem suam ad valentiam* 40 s. *nuper crescen. succiderunt*: The Defendants said, that the Close, and at the time of the Trespass, was the Freehold of Sir *John Leventhrop* Knight, &c. and that the said Oak was a Timber-Tree of 30 years growth and more, and justifies the cutting down of the Tree by his Command: The Plaintiff replyes, and saith, That the said Close, and a House, and 28 Acres of Land in *Ugley*, are

Copy-

Copy-hold, and parcel of the Mannor of *Ugley*, &c. Of which Mannor, *Edward Leventhrop* Esq; Father of Sir *John Leventhrop*, was seized in Fee, and granted the said Houſe, Lands, and Cloſe, to the said *Richard Heydon*, and his Heirs, by the Rod, at the Will of the Lord, according to the Cuſtome of the said Mannor; and that within the Mannor there is such a Cuſtome, *Quod quilibet tenens Cuſtomar. ejuſdem Manerii ſibi & haeredibus ſuis ad voluntat. Dom. &c. a toto tempore ſupradicto uſus fuit ad ejus libitum amputare ramos omnimodum arborum*, called *Pollingers*, or *Husbords*, *ſuper terris & tenement. ſuis Cuſtomar. creſcen. pro ligno combuſtibili*, &c. and alſo, to cut down and take all manner of Trees called *Pollingers* and *Husbords*, and all other Timber Trees, &c. for reparation of their Houſes, and alſo for Plough-boot and Cart-boot; and that all the Trees, &c. hitherto growing upon, &c. were not ſufficient for the neceſſary uſes aforeſaid; And that the said *Richard Heydon*, from the time of the said Grant, had preſerved, &c. all Trees, &c. growing upon the said Lands to him granted: and that after the said *Edward Leventhrops* death, the Mannor deſcended to the said Sir *John*; and that at the time of the Treſpaſs, the aforeſaid Meſſuage of the said *Richard Heydon*, was in decay, &c. upon which the Defendant demurred in Law.

The Caſe was often argued at Bar; and now this Term it was argued at the Bench by the Juſtices, and therein theſe Points were reſolved.

1. That the firſt part of the Cuſtom was abſurd and repugnant, but it extends not to the Caſe; for the laſt part of the Cuſtom, which concerns the cutting down of the Trees, concerns the Point in queſtion; and ſo the firſt part of the Cuſtom is not material. And when it was objected, that the pleading that the Meſſuage of the Plaintiff was in decay, was too general, as appears by the Book

Book, 10 *Ed.* 4. 3. To that it was answered by *Cook* Chief Justice, That the said Book proved the pleading in the Case at Bar was certain enough; and therewith agrees 7 *H.* 6. 38. 34 *H.* 6. 17.

68. 2. It was Resolved, That in this Case, without question, there needs not to alleadge more certainty; for the Copyholder doth not here take it according to the Custom; but the Lord of the Mannor cuts it down, and preventeth the Copyholder of his benefit; and therefore he needeth not to shew any decay at all, but only for increasing of Damages: for the Lord does the wrong, when he cuts down the Tree which should serve for Reparation.

3. It was Resolved, That of Common-Right, as a thing incident to the Grant, the Copyholder may take House bote, Hedge-bote, and Plough-bote, upon his Copy-hold, *Quia concesso uno, conceduntur omnia sine quibus id consistere non potest*: And with this agrees, 9 *H.* 4. *Waste* 59. But the same may be restrained by Custome.

4. It was Resolved, That the Lord cannot take all the Timber-Trees, but he ought to leave sufficient for Reparation of the Customary Houses, and for Plough-bote, &c. for otherwise great Depopulation will follow. And it is to be understood, that *Bote* being an old *Saxon* Word, hath two significations.

First, *Compensatio criminis*, as *Frithbote* signifies to be discharged, for giving amends for breach of the Peace; *Manbote*, to be discharged of amends for the death of a man.

And secondly, for Reparation; as *Bridg bote*, *Burgh-bote*, *Castlebote*, *Parkbote*, &c. And it is to be known, that *Bote* and *Estovers* are all one. And *Estover* is derived of the *French* Word, *Estover*, *i. e. fovere*, *i. e.* to keep warm, cherish, &c. And there are four kinds of *Estovers*, *viz.*

First,

First, *Arandi*. Secondly, *Ardendi*. Thirdly, *Construendi*. And fourthly, *Claudendi*, viz. *Ploughbote*, *Firebote*, *Housebote*, and *Hedgebote*.

5. It was Resolved, That the Copyholder shall have a general Action of Trespass against his Lord, *Quare clausum fregit & arborem suam succi it*: for Custome hath fixed it to his Estate against his Lord. And the Copyholder, in this Case, hath as great an Interest in the Timber Trees, as he hath in his Messuage which he holds by Copy. And if the Lord break or destroy the House, without question the Copyholder shall have an Action of Trespass against his Lord, *Quare domum fregit*, and by the same Reason for the Timber-Trees which are annexed to the Land, and which he may, for Reparation of his Messuage, or else it cannot stand. See *Trin.* 40 *Eliz. Rot.* 37. in *B. R.* between *Stebbing* and *Grosenor*. See *Taylor's* Case, in the Fourth Part of my Reports; and see 5 *H.* 4. 2. 2 *H.* 4. 12. 2 *E.* 4. 15. 2 *H.* 6. 4. 7 *H.* 4. 15. 19 *H.* 6. 34. 11 *H.* 4. 28. 11 H. 4. 23. 21 H. 7. 14. *b. acc.* 35 H. 6. 24. 30 H. 6 *Trisp.* 10. &c. 21 H. 7. 15. 11 H. 4. 23. See *Fitz. Trespass. ultimo* in the *Abridgement*. And afterwards, the same Term, Judgment was given on the principal Case for the Plaintiff.

Pasch. 8 *Jacobi*. *In Communi Banco*. 70.

The Parishioners of St. *Alphage* in *Canterbury*, by Custome ought to choose the Parish-Clerk, whom they chose accordingly: The Parson, by colour of a new Canon, made at the Convocation in the Year of the King that now is (which is not of force to take away any Custome) drew the Clark before Dr. *Newman*,

man, Officiall of the Arch-Bishop of *Canterbury*, to deprive him, upon the Point of right Election, and for other Causes: And upon that, it was moved at the Bar, to have a Prohibition: And upon hearing of Dr. *Newman*, and himself, and his Councel, a Prohibition was granted by the whole Court; because the Party chosen is a meer Temporal Man, And the means of choosing him, *viz.* the Custome is also meerly Temporal: So as the Official cannot deprive him; but, upon occasion, the Parishioners may displace him. And this Office is like that of a Church-Warden, who though they be chosen for two yeers; yet, for cause, they may displace them; as is held in 26 H. 8. 5. And though the Execution of the Office, concerneth *Divine Service*, yet the Office it self is meer Temporal. See 3 *E.* 3. *Annuity* 30. 18 *E.* 3. 27. And it is to be known, that the deprivation of a man of a Temporal Office or Place, is a Temporal Thing. Upon which no Appeal lyes by the 25 H. 8. but an Assize, as in 4 *Eliz. Dyer* 209. And therewith agrees the Book, 8 *Ass. Sireses* Case. But if a Dean of a Cathedral Church, be deprived before the Commissioners of the King, he may appeal to the Delegates within the said Act, 25 H. 8. For a Deanery is a Spiritual Promotion, and not Temporal: And before that Act, in such Case, the Appeal was to *Rome* immediately.

Mich.

Mich. 5 *Jacobi* Regis. *In Banco Regis*. Prichard *and* Hawkin's Case. 71.

John Prichard brought an Action upon the Case, against *Robert Hawkins*, for Slanderous Words publish'd the last Day of *August*, 3. *Jacob. Viz.* That *Prichard*, which serves Mistriss *Shelley*, did murder *John Adam's* Child (*Quandam* Isabellam Adams *modo defunct. filiã cujusdam* Johannis Adams *de &c. innuendo:*) Upon which a Writ of Errour was brought in the *Exchequer*-Chamber, upon a Judgment given for *Prichard* in the *Kings-Bench*; and the Judgment was reversed in *Easter* Term, 7 *Jac.* because it doth not appear, that *Isabel* was dead at the time of speaking the words; for *tunc defunct.* ought to have bin in stead of *modo defunct.*

Pasch. 8 *Jac. In Banco Regis*; Dison *and* Bestney's *Case*. 71.

Humphry Dyson said of *Nicholas Bestney*, a Councellor at Law of *Grays-Inne*; *Thou a* Barrester? *Thou art no* Barrester; *Thou art a* Barretor, *Thou wert put from the* Bar, *and dareſt not ſhew thy ſelf there: Thou ſtudy the* Law? *thou haſt as much Wit as a* Daw. Upon *Not Guilty* pleaded, the Jury found for the Plaintiff, and gave 23 *l.* Damages; upon which Judgment was given: and upon Writ of Errour, in the *Exchequer*-Chamber, the Judgment was affirmed.

Pasch.

71. Pasch. 8 Jac. Regis. *In Banco Regis*; Smith *and* Hill's *Case*.

Noah Smith brought an Action of Assault and Battery, against *Walter Hill* in the *Kings-Bench*, which began *Pasch.* 7 *Jac. Rot.* 175. Upon *Not Guilty* pleaded, a Verdict and Judgment for the Plaintiff, and 107 *l.* given for Damages and Costs. In a Writ of Errour in the *Exchequer* Chamber, the Errour was assigned in the *Vic: Fa:* which was certified by Writ of *Certiorari*; and, upon this Writ, no Return was made upon the Back of the Writ, which is called *Returnum Album.* And for that Cause, this *Easter* Term, the Judgment was reversed.

72. Trin. 7 Jac. Regis. *In Cur. Wardorum.*

It was found by Writ of *Diem clausit extremum*, after *Roger Wescots* death, that the said *Roger*, the day that he dyed, was seized of and in the moiety of the Mannor of *Trewelliard*, in his Demesne as of Fee, and so dyed seized; and that the moiety of the said Mannor 19 *E.* 3. was holden of the then Prince, as of his Castle of *Trematon*, parcel of his Dutchy of *Cornwall* by Knight-Service; as appears by a certain Exemplification of *Trematon* for the said Prince, made 9 *Martii*, 19 *E.* 3. And the Words of the Extent were, Willielmus *de* Torr *tenet duo feoda et dimid. Milit. apud* Picke Strickles-combe & Trewalliard *per servitium militare & reddit inde per annum* 8 d.

And it was Resolved by the two Chief Justices, and Chief Baron, That the Office, concerning the Tenure, was insufficient and void: for the Verdict of a Jury ought to be full and direct, and not with a *prout patet*: for

for now the force of the Verdict lyes upon the Extent; which if it be falſe, he who is grieved ſhall have no remedy by any Traverſe: for they have not found the Tenure indefinite, which may be Traverſed but with a *prout patet*, which makes the Office in that Point inſufficient. And upon that *a melius inquirendum* ſhall iſſue. And herewith agrees F. N. B. 255.

FINIS.

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MVSEVM
BRITANNICVM

1

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